Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

RONALD L. AARON, et. al.,

Petitioners,

vs.

THE CITY OF WICHITA, KANSAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

29 U.S.C.A. § 207(e)(2) OF THE FAIR LABOR STANDARDS ACT PERMITS AN EMPLOYER TO EXCLUDE PAYMENTS MADE FOR OCCASIONAL PERIODS WHEN NO WORK IS PERFORMED DUE TO VACATION, HOLIDAY, ILLNESS, FAILURE OF THE EMPLOYER TO PROVIDE SUFFICIENT WORK, OR OTHER SIMILAR CAUSES FROM THE REMUNERATION PAID THE EMPLOYEE IN DETERMINING AN EMPLOYEE'S "REGULAR RATE".

THE QUESTION IN THIS CASE IS WHETHER PAYMENTS MADE TO FIREFIGHTERS FOR ABSENCES, KNOWN AS "KELLY DAYS" WHICH ARE PRESCHEDULED TO REGULARLY OCCUR QUARTERLY AND INTENDED BY A MUNICIPALITY TO REDUCE HOURS OF WORK AND OVERTIME LIABILITY, ARE WITHIN THE STATUTORY EXCLUSIONS UNDER 29 U.S.C.A. § 207(e)(2).

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners Ronald L. Aaron, Douglas K. Acuna, Berton Adamson, Brian E. Addis, Mark J. Alexander, Donald E. Allen, Troy W. Allen, Gary W. Anderson, Kim L. Anderson, Thomas J. Anderson, Daniel J. Armstrong, Edward L. Arnold, Kenneth D. Ast, Robert W. Avery, Mark D. Baker, Sam W. Bannister, III, Robert M. Barrett, James J. Barrientos, Robert G. Battaglear, William C. Bean, F. Howard Becker, Jack N. Bennett, Alan L. Benson, Floyd R. Bess, Stuart Bevis, Charles F. Bickel, Joseph F. Bickel, Gregory L. Black, Gary L. Blankinship, Timothy N. Bohannan, Webster T. Bourn, Chris M. Bowen, Robert L. Bradfield, Robert S. Brown, Ronald J. Brown, Darrin L. Bruhn, Frank E. Buck, Richard A. Bushey, David L. Cain, Everett J. Carpenter, Robert R. Carr, Thimothy M. Carr, Rickey S. Carter, George T. Chandler, Ronald L. Charles, Bryan Chavez, Dwayne F. Chew, Byron N. Chrisler, Paul D. Christman, William E. Clarkin, Michael R. Clevenger, Larry D. Clyne, Gale D. Cocannouer, Andrew M. Cole, Larry C. Cole, Gregory D. Conner, James D. Conner, William R. Cordts, Michael D. Corns, Joseph F. Couey, Dennis R. Cowel, John W. Crandell, Kenneth A. Crawford, Ronald D. Crisler, Mark Curless, Gary E. Curmode, Michael D. Custer, Robert W. Davidson, Ray J. Davis, Stephen R. Davis, Brian L. Dody, Scott A. Downs, Meridith B. Dowty, Jerry L. Duff, David L. Dunagan, Harley D. Dyer, Billy W. Dysart, Darren T. Dysart, Michael L. Ellsworth, Matthew W. Elsea, Kenneth A. Enyeart, Ronald B. Evans, R. Michael Fenton, Larry D. Feuerborn, James L. Fiant, Gary M. Fisher, Troy Franklin, Jr., William

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS DELIVERED BELOW

The opinion of the Court of Appeals for the Tenth Circuit [App. 1 - 17] is reported at 54 F. 3d 652. On June 9, 1995, the Tenth Circuit entered an order denying petitioners' petition for rehearing. [App. 84 - 91]

The decisions of the United States District Court for the District of Kansas (Kelly, D.J.) [App. 18 - 41 and App. 76 - 80] are reported at 797 F. Supp. 898 and 822 F. Supp. 683. The decisions of the United States District Court for the District of Kansas (Kelly, D.J.) entered on the March 9, 1993 and on April 16, 1993, were not reported. They are reprinted in the appendix hereto, [App. 42 - 67 and App. 68 - 75] as is the judgment filed August 5, 1993. [App. 81 - 83]

JURISDICTION

Judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 9, 1995, and petitioners' petition for rehearing was denied on June 9, 1995. This petition is filed within the 90-day period allowed by law and 28 U.S.C.A. § 1254(1) confers jurisdiction to review the judgment in question by writ of certiorari.

STATUTE AND REGULATIONS INVOLVED

Statute

The maximum hours provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §§ 207 *et seq.* provide in pertinent part:

> **29 U.S.C.A. § 207(e) "Regular rate" defined.** As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –

. . .

> (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

Regulations

Interpretations of the Department of Labor provide in pertinent parts:

29 C.F.R. § 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) *Section 7(e).* This subsection of the Act provides as follows:

> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:
>
> . . .
>
> (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or

other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; [discussed in §§ 778.216 through 778.224].

. . .

(c) *Only the statutory exclusions are authorized.* It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into the total compensation received by the employee before his regular hourly rate of pay is determined.

29 C.F.R. § 778.218 Pay for certain idle hours.

(a) *General rules.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay under section 7(e)(2) of the Act and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Act.

(b) *Limitations on exclusion.* This provision of section 7(e)(2) deals with the type of absences

which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either "holidays" or "vacations," or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

(c) *Failure to provide work.* The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule (as discussed in §§ 778.321 through 778.329), ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.

(d) *Other similar cause.* The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family

> member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

Other statutes and regulations referred to by footnotes and within the regulations are set forth in Appendix H. [App. 92 - 111]

STATEMENT OF THE CASE

On November 14, 1990, petitioners filed this action in the United States District Court of Kansas pursuant to 29 U.S.C.A. § 216(b) alleging violations of the overtime provisions of the Fair Labor Standards Act. Petitioners alleged, among other things, a violation of 29 U.S.C.A. § 207(a) claiming respondent had computed and paid their straight and overtime hours at fictitious, understated "regular rates" which had been arrived at by the use of a formula which employed an "overstated" divisor in converting petitioners' salaries to regular hourly rates.[1]

It was contended the divisor was "overstated" because it included hours not worked by the petitioners

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[1] The respondent's "regular rate" formula is expressed by the Tenth Circuit as dividing biweekly salaries by 112 hours [App. 6] and by the trial court as dividing annual salaries by 2,912 hours (56 hours x 52 weeks). [App. 29] In practice, employers selecting the exemption provided by 29 U.S.C.A. § 207(k) follow 29 C.F.R. §§ 553.201, 553.230 and 553.233 under which the equivalent "work period" salary represents the numerator. Two hundred and sixteen hours would represent respondent's divisor. [App. 93-95, 107-111]

due to prescheduled, paid absences known as "Kelly Days" which were intended to reduce the petitioners' hours of work and the respondent's overtime liability.[2] Petitioners pointed to a series of union negotiated contracts, which beginning in 1976, and continuing to 1987, had reduced their regular hours of work to the nonovertime maximum under the FLSA and beginning in the 1987 contract year to the present to 208 hours in a 27-day work period. [App. 112 - 113] Petitioners argued that, by including the hours represented by the "Kelly Days" in the divisor of their salaries, the respondent's formula mathematically eliminated from their "regular rates" payments made for hours not worked and, therefore, violated 29 U.S.C.A. § 207(e) because the "regular rates" did not include all remuneration. Petitioners further argued that the "Kelly Days" absences were of further significance in applying 29 C.F.R. § 778.113 [App. 30] because it would logically follow that, after their work schedules of working every third day had been reduced by the "Kelly Days", the salaries were intended to compensate them for their remaining hours.

The respondent defended by claiming that the petitioners were hourly employees and that, since the hourly rates derived by its formula appeared in the more recent collectively bargained contracts, the petitioners were bound by the hourly rates. [App. 26] In response to respondent's claim that the petitioners were bound by hourly rates appearing in the contracts, petitioners

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[2] The term "Kelly Days" is of uncertain lineage, but is commonly used in Fire Departments throughout the country to refer to forced absences from work to minimize overtime hours.

denied they had agreed to the rates as evidenced by the union's attorney's letter to the respondent's officials rejecting the respondent's formula. [App. 9] Respondent admitted the parties had contracted for the "Kelly Days" and that they were designed to reduce the number of hours of work of the petitioners and its overtime liability, but claimed the absences were similar to vacations and thus excludable from petitioners' remuneration under 29 U.S.C.A. § 207(e)(2). [App. 31]

Petitioners and respondent filed cross-motions for summary judgment asserting the above stated positions. On June 17, 1992, the district court entered the first of a series of memoranda and opinions directed to the "regular rate" issue. [App. 18 - 41] The original memorandum and order of June 17, 1992, was followed by memoranda and orders on March 9, 1993, [App. 42 - 67] and April 16, 1993, [App. 68 - 75] which both bear upon the June 17, 1992, memorandum and order. Two aspects of the June 17, 1992 memorandum require emphasis:

> (1) The trial court first concluded that the inclusion of the 96 hours represented by the "Kelly Days" understated the petitioners' regular rates and petitioners' annual compensation should be divided by 2,816 hours and not 2,912 hours under 29 U.S.C.A. § 207(e). [App. 30]
>
> (2) The memorandum stated "[A] Kelly day is a 24-hour period which is paid but which the officer does not have to work. Each officer is allowed four Kelly days per year; however, only one Kelly day may be used in a quarter. Evidence submitted indicates the Kelly day policy

was adopted by the City in order to keep overtime compensation at a minimum level."[3] [App. 30-31]

By memoranda and orders entered on March 9, 1993, and April 16, 1993, the district court on rehearing and clarification of its June 17, 1992 memorandum and order reversed its earlier decision by validating a formula which mathematically eliminated from petitioners' annual salaries payments made for "Kelly Days" holding that these payments were the equivalent of payments made for vacations. [App. 72 - 74] Disregarding the significance of absences due to "Kelly Days," the trial court concluded the salaries were intended to compensate petitioners for the nonovertime hours and determined 2,750 hours represented the correct divisor of petitioners' annual salaries. [App. 73 - 75]

Respondent appealed to the Tenth Circuit contending that the trial court had erred by concluding as a matter of law that respondent's "regular rate" was understated because the divisor of the petitioners' salaries included overtime hours. Petitioners cross-appealed the district court's denial of liquidated damages under 29 U.S.C.A. § 216(b) and its conclusion that respondent had not acted willfully. [App. 61 - 65] Petitioners continued to argue that respondent's treatment of "Kelly Days" violated 29 U.S.C.A. § 207(e)(2), since the payments were not made

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[3] The respondent's "Kelly Day" policy also required that only one "Kelly Day" be used within a 27-day work period and that "Kelly Days" be drawn for or selected in October for the next year based on seniority.

for absences similar to vacations, as the district court had concluded. [App. 8]

On May 9, 1995, the Tenth Circuit reversed the trial court's decision that respondent had used an overstated divisor in its "regular rate" formula, concluding that the trial court had erred in holdings as a matter of law that nonovertime hours could not be used in the conversion of the salaries to hourly rates. [App. 6 - 7] In upholding respondent's formula, the Tenth Circuit reasoned that, although the divisor had been objected to by the petitioners' union's counsel, petitioners had accepted same and, therefore, petitioners were bound by the use of the rate derived by the alleged "overstated" divisor. [App. 9] As for petitioners' claim that respondent was in violation of 29 U.S.C.A. § 207(e), the appeals court held "we believe Kelly Days were simply another form of paid vacation and, therefore, properly included in hours to be compensated by the regular biweekly salary." [App. 8 - 9]

REASONS FOR GRANTING THE WRIT

This case presents an important Fair Labor Standards Act question: Whether payments for prescheduled and regularly occurring absences, which are intended by the employer to reduce hours worked and overtime liability, are excludable from an employee's remuneration pursuant to 29 U.S.C.A. § 207(e)(2). The decisions of the lower courts, which liken the paid absences know as "Kelly Days" to vacations and hold pay for such absences excludable ignore the plain language of the statute and congressional intent; contradict the Department of Labor

interpretations; and create confusing precedent with a far-reaching impact on similar employees protected by the FLSA overtime provisions. The construction of 29 U.S.C.A. § 207(e)(2) by the Tenth Circuit sustaining the validity of respondent's "regular rate" creates a direct conflict with this Court's decisions, which require that deference be given to the requirement of 29 U.S.C.A. § 207(e) and the "regular rate" include all remuneration paid an employee. The Tenth Circuit's decision also creates an apparent conflict with decisions of this Court which recognize the nonwaiverability of FLSA rights. Therefore, review on certiorari is necessary to resolve this important federal statutory interpretation question and the conflicts created to insure national uniformity in federal law.

I. THE IMPORTANT FEDERAL STATUTORY INTERPRETATION QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT TO PROVIDE GUIDANCE IN THE ADMINISTRATION OF THE FLSA.

A. Payments For Prescheduled, Regularly Occurring Absences Intended By An Employer To Reduce Hours Worked And Overtime Liability Are Not Within The Plain Language Of The Statutory Exclusion From An Employee's Remuneration As "Payments Made For Occasional Periods When No Work Is Performed Due To Vacations."

The FLSA mandates the payment of overtime compensation to covered employees. 29 U.S.C.A. § 207(a)(1) prohibits employment of any employee in excess of 40

hours per week "unless such employee receives compensation" at a rate of not less than one and one-half times the employee's regular rate.[4] The "regular rate" at which an employee is employed is deemed to include all remuneration for employment paid to, or on behalf of, the employee under 29 U.S.C.A. § 207(e), other than the "statutory exclusions" provided by 7(e) 1 through 7. 29 C.F.R. § 778.108; 29 C.F.R. § 778.200.

Section 7(e)(2) excludes from an employee's remuneration in the computation of the "regular rate" any payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar causes. The word "occasional," as it modifies the word "periods," evidences Congress had in mind absences which were irregular and do not occur according to a fixed or certain scheme.[5] Each of the types of absences predicted in Section 7(e)(2) would normally not reoccur

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[4] A partial exemption is provided by 29 U.S.C.A. § 207(k) for employment by public agencies engaged in fire protection or law enforcement activities under which the agencies may adopt "work periods" in lieu of the "workweeks" under which an employer is exposed to overtime liability only after an employees hours exceed the average number as determined by the Secretary pursuant to § 6(c)(3) of the Fair Labor Standards Amendments of 1974 [29 U.S.C.A. § 213 note]. The number of maximum hours firefighters are permitted to work in a work period before overtime is required is established by the Department of Labor Regulation in 29 C.F.R. § 553.230. [App. 108-110]

[5] Webster's Third New International Dictionary, G. & C. Merriam Co., 1961, defines the word as "met with, appearing or occurring irregularly and according to no fixed or certain scheme."

at fixed intervals, as the Kelly Days do quarterly, nor would an employer identify and incorporate such absences as a term of the employment agreement accompanied by a statement of their purposes of reducing work schedules and overtime liability. The Tenth Circuit's holding that "Kelly Days" are another form of paid vacations [App. 8 - 9] mischaracterizes them.

In the past, this Court has refused "to extend an exemption to other than those plainly and unmistakably within [the FLSA's] terms and spirit." *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Arnold v. Ben Kanowosky*, 361 U.S. 388, 392 (1960). Similarly, where the FLSA provides exemptions "in detail and with particularity," this Court has found this to preclude "enlargement by implication." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944). See also *Powell v. United States Cartridge Co.*, 339 U.S. 497, 512 (1950); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 183-84 (1946).

The plain language of 29 U.S.C.A. § 207(e)(2) does not evidence a congressional intent to exclude from an employee's remuneration for prescheduled and regularly occurring absences intended by the employer to reduce the number of hours worked and consequently reduce its overtime liability. A review of the statutory construction given 29 U.S.C.A. § 207(e) by the lower courts is necessary to insure uniformity in the construction of the statutory exclusion provided by 29 U.S.C.A. § 207(e)(2).

B. Absent Evidence Of A Specific Legislative Intent That The Statutory Exclusion From An Employee's Remuneration Should Include Payments Made For Prescheduled, Regularly Occurring Absences Intended By An Employer To Reduce Its Overtime Liability, The Principal Congressional Purpose In Enacting The FLSA Precludes Such An Exclusion.

The particular question at issue does not appear to have been specifically considered by Congress or the courts. Neither the statutory language, the legislative reports or hearings evidence same. In the absence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by the legislative history and the provisions in and structure of the Act. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705-06 (1945).

As this Court held in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577, 578 (1942), the congressional purpose in enacting § 7(a) [29 U.S.C.A. § 207(a)] was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirements; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act. The respondents "pay status" plan (where the petitioners were ostensibly paid at the understated rates for every hour worked and hours not worked such as vacations and "Kelly Days" annually or 2,912 hours) enables the respondent to avoid paying for 96 hours annually,

thereby creating little incentive to avoid financial pressure. At the same time, the respondent deprives the employees of their statutory right to receive for all hours worked in excess of the statutory maximum of 204 hours in a 27-day work period compensation at one and one-half times the actual regular rate. *Walling v. Helmerich and Payne, Inc.*, 323 U.S. 37, 40 (1944). Congressional intent is not met by respondent's interpretation of the Section 207(e) and this Court should grant petitioners' writ to insure that the expectations of Congress are met.

C. The Lower Courts' Decisions Contradict Well-Established Construction Given The Statute By The Administrative Agency Charged With Its Interpretation And Enforcement.

Department of Labor interpretations are entitled to considerable weight by this Court, absent compelling evidence that they are incorrect. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 592 (1983).

The Secretary's interpretations require, as does the Act, that all remuneration which does not fall within one of the seven exclusionary clauses be added to the total compensation before an employee's regular rate is determined. 29 C.F.R. § 778.200(c). 29 C.F.R. § 778.218(b) provides a general limitation on the exclusions by requiring that the absences be "infrequent or sporadic or unpredictable." The paid "Kelly Day" absences clearly share none of the characteristics provided by the limitations because

they are prescheduled the prior year and regularly occur within each quarter of the year.

Further interpretations of the Department identify reduced work schedules under 29 C.F.R. §§ 778.321 through 778.329 and routine recurrent absences as the types of absences which would not qualify for the statutory exclusion provided by 29 U.S.C.A. § 207(e)(2) as a "failure to provide work." 29 C.F.R. § 778.218(c).[6]

Finally, a reading of 29 C.F.R. § 778.218(d) leaves no doubt that the Department of Labor would not agree that the payments for "Kelly Day" absences were excludable under 29 U.S.C.A. § 207(e) as the equivalent of vacations or "simply another form of vacation" as the Tenth Circuit concluded [App. 8-9]. Section 218(d) identified the other types of absences contemplated and none are similar to

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[6] The Tenth Circuit misinterprets and misapplies 29 C.F.R. § 778.325 by failing to recognize the import of the reduced work schedules of the petitioners. 29 C.F.R. § 778.325 is intended to illustrate the method to be employed in the calculation of the regular rate where the salary is originally intended to cover hours in excess of the statutory maximum and the work schedule is then reduced, but remains above the statutory maximum. The opinion completely ignores the adjustments to the regular rates which are required by § 778.325 to accommodate the reduced work schedules. Although the petitioners do not believe that § 778.325 is applicable, even if it was, a correct application of it would not lead to the same conclusion of the Tenth Circuit that the regular rate should be computed by dividing the biweekly salaries by 112 hours, since the reduction of work schedules to an uncertain number of hours requires that the hours worked be employed as the divisor as required by *Overnight v. Missel, supra*, or a fixed number of hours if the parties have agreed the salary covers that number of hours. 29 C.F.R. § 778.113.

"Kelly Days." This regulation concludes with the statement "Only absences of nonroutine character which are infrequent or sporadic or unpredictable are included in the 'other similar cause' category."

The district court and Tenth Circuit's holdings that "Kelly Days" were simply another form of paid vacation, and therefore properly included within hours to be compensated by the regular biweekly salary are inconsistent with the Secretary's interpretations. Affirmation of the Secretary's interpretation by this Court is necessary to insure that payments for absences similar to those encountered herein are not excluded in reliance on the lower courts' decisions.

D. The Statutory Construction Of The Lower Courts Of An Important FLSA Statute Leaves The Meaning Of It In A State Of Confusion Which Will Impact The Administration Of The FLSA Nationwide And Has Significant Fiscal Ramifications.

The volume of memoranda and orders of the lower courts demonstrate the difficulty encountered in the resolution of the issues raised. Much of the confusion encountered by the lower courts occurred primarily because of the failure of the lower courts to recognize that petitioners' salaries should include all remuneration paid for their employment. Had the lower courts correctly addressed the manner in which the "Kelly Day" payments are to be treated under 29 U.S.C.A. § 207(e)(2), the issue surrounding respondent's regular rate computations would have been relatively simple. Petitioners submit that because of the confusion encountered in this

case, and the confusion that will be encountered as a result of the lower courts' decisions herein, this Court should grant petitioners writ so as to provide further clarification and direction to other employers and courts.

The judgment entered herein is of a significant amount. Many fire departments in this country use the same type or similar paid absences. If this Court fails to reconsider the lower courts' interpretation of 29 U.S.C.A. § 207(e)(2), employers might be induced to follow the lower court's interpretation in an effort to alleviate fiscal short falls. The impact would be felt by thousands of firefighters who have traditionally been granted paid "Kelly Days" under similar contracts, which under the Tenth Circuit's interpretation of Section 7(e) would become unpaid "Kelly Days".

II. THE TENTH CIRCUIT'S DECISION IS IN DIRECT AND APPARENT CONFLICT WITH CONTROLLING FLSA PRINCIPALS OF THIS COURT.

The decision of the Tenth Circuit directly conflicts with "regular rate" principals of this Court which hold that the "regular rate" include "all remuneration for employment". In addition, the Tenth Circuit has totally disregarded prior rulings of this Court pertaining to the waiverability of FLSA rights.

A formula specifying that some number of hours, which is unrelated to hours worked, should be employed in computing the regular rate for purposes of Section 207(a) of the Act cannot be effective, *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 429 (1945), since the regular rate

> . . . is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" . . . *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945).

The exceptions pertinent to the claim advanced here is for payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar causes. If the "Kelly Day" payments do not fall within this exclusion, or any other, respondent's hourly rate computation fails, since from all such wages the regular hourly rate must be extracted. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948); *Walling v. Harnischfeger Corp., supra.*

The direct conflict which is created by the Tenth Circuit's holding that "Kelly Day" payments are excludable from the "regular rate" computation arises because Congress and this Court require that the "regular rate" formula include all remuneration for employment. At issue is the number of hours which control the remuneration ultimately received. This is an actual fact. Presently, the actual fact is that 2,816 and not 2,912 hours control petitioners' hourly earnings and is the appropriate divisor in computing the regular rate. During the previous period in which the "Kelly Days" absences reduced the work schedules to the maximum hours permitted under the Act, the actual fact was that the salary was earned by working 2,750 hours annually and not 2,912

hours. This interpretation is consistent with what the Act expressly provides. The lower courts' disregard of the nonexcludability of payments for "Kelly Days" creates *fictitious rates* for the petitioners in direct violation of *Walling v. Harnischfeger Corp., supra.*

Although petitioners have found no cases which address the excludability of paid absences which can be likened to petitioners' "Kelly Days," circuits which have considered other types of statutory exclusions under Section 207(e) have consistently returned to this Court's definition of the regular rate at which he is employed. For example, in *Walling v. Garlock Packing Co.*, 159 F.2d 44 (2nd Cir. 1947), bonuses were includable as part of the remuneration, since they were regularly paid quarterly to employees who had been hired on the basis that they would receive the same. Similarly, the petitioners' "Kelly Day" pay is regularly paid quarterly and established by the collective bargaining agreements.

Finally, a reading of the lower courts' holdings evidences an apparent disregard of further cornerstones established by this Court as to the nonwaiverability of rights under the Act. [App. 9] By essentially holding that the formulation over the union's counsel's objection and the acceptance of the rates paid bars petitioners' complaint, the Tenth Circuit again creates a conflict with this Court's decisions as to FLSA rights being waived or abridged by contract, either individually or through collective bargaining. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 740-41 (1981) and cases cited therein. The lower court completely ignores, in its rush to a

conclusion, *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 463 (1948) which holds "[N]othing to our knowledge in any act authorizes us to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining".

Review on certiorari is, therefore, essential to resolve these direct and apparent conflicts, and to insure that the fundamental principals of this Court's construction of the FLSA are not eroded.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RONALD L. AARON, et al.,	)	
	)	
Plaintiffs-Appellees/, Cross-Appellants,	)	Nos. 93-3245, 93-3262
	)	
v.	)	
	)	
THE CITY OF WICHITA, KANSAS,	)	
	)	
Defendant-Appellant/, Cross-Appellee.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 90-1536-PFK)
(797 F.Supp. 898; 822 F.Supp. 683)

(Filed May 9, 1995)

Charles W. Harris, Curfman, Harris, Rose, Weltz & Smith, Wichita, Kansas (Ronald D. Innes, Wichita, Kansas, with him on the brief), for Plaintiffs-Appellees/Cross-Appellants.

Richard D. Ewy, Foulston & Siefkin, Wichita, Kansas (Robert L. Howard and Timothy B. Mustaine, Foulston & Siefkin, Wichita, Kansas, with him on the brief), for Defendant-Appellant/Cross-Appellee.

Before **EBEL, MCKAY,** and **REAVLEY***, Circuit Judges.

REAVLEY, Circuit Judge.

City firefighters sued the City of Wichita (the "City") for wages due under the Fair Labor Standards Act ("FLSA"). The district court concluded that the City had violated the FLSA by improperly calculating the "regular rate" of pay used to compute overtime and by exempting certain employees from FLSA overtime requirements and granted summary judgment for the firefighters. We reverse. We dismiss the firefighters' claims that the City calculated an improper FLSA "regular rate," and we remand the claims by the Fire Captains, Fire Division Chiefs, and Fire Battalion Chiefs that the City had improperly exempted them from FLSA overtime requirements for a "duties test" determination.

BACKGROUND

The firefighters in this suit work shifts of 24 consecutive hours, followed by 48 consecutive unpaid hours off work. The firefighters are in "pay status" (at work or on paid leave, such as sick leave or vacation) 56 hours per week, on average, or 112 hours every two weeks. During the years in question in this case, the employment terms for the rank and file firefighters (as distinguished from

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* The Honorable Thomas M. Reavley, United States Court of Appeals, Fifth Circuit, sitting by designation.

the Captains and Chiefs) were specified in written Memoranda of Agreement ("MOAs") collectively bargained between the International Association of Fire Fighters ("IAFF") and the City. Two of the MOAs for the years relevant to this case contain pay schedules indicating both bi-weekly salaries and hourly rates and the MOA for one year indicates an hourly rate only. However, both parties concede that the appropriate regular rate should be based on the bi-weekly salaries agreed upon in the bargaining process. Both parties also agree that the rank and file firefighters were paid for every hour worked even though the regular rate was derived from a negotiated bi-weekly "salary." The only dispute is over how many hours the bi-weekly salary was intended to compensate.

The firefighters contend that the salaries in the MOA schedules divided by the average number of non-overtime hours worked by the firefighters equals the appropriate hourly rate. The City contends that these salaries should be divided by the average number of hours the firefighters are in "pay status" during a bi-weekly period (112). In the MOA schedules with both bi-weekly and hourly rates, the bi-weekly salaries divided by the corresponding hourly rate equals 112, indicating that the hourly rates in these schedules were determined by dividing the MOA bi-weekly salaries by 112 hours. Therefore, the City's formula for the regular rate has support in the written MOAs signed by both parties.

During the MOA negotiations, the firefighters' representative objected to the City's formula for computing the hourly rate, arguing that 112 was not the correct divisor.

Yet, the firefighters signed the agreements without insisting on a different designated hourly rate. It is undisputed that the firefighters were actually paid at the bi-weekly period for every non-overtime hour worked at the regular rate computed using the City's formula and for every overtime hour at one and one-half times the regular rate computed using this formula.

The firefighters' complaint alleged that the City had violated the FLSA because the City: 1) failed to pay them for sleep and meal-time hours; 2) improperly exempted Fire Captains, Battalion Chiefs and Division Chiefs from overtime requirements; and 3) disregarded controlling regular rate principles by designating an artificial hourly rate of pay derived by dividing plaintiffs' salaries by an overstated divisor. The firefighters moved for summary judgment on all three claims and asked for a finding of willfulness on the part of the City which would extend recovery from two to three years. The City, on the other hand, contended that, even if it did violate FLSA, its actions were based on an objectively reasonable good faith belief that it was complying with the FLSA, and it was therefore not obligated to pay liquidated damages under 29 U.S.C. § 216(b).

The district court disposed of the case by summary judgment. The first claim for unpaid hours was denied, but the court granted the firefighters summary judgment on the second and third claims after finding that the regular rate of pay was improperly calculated and that the Fire Captains, Battalion Chiefs, and Division Chiefs were not exempt from FLSA requirements. The court ruled for the City on the willfulness and good faith

issues. The firefighters appeal the court's judgment denying awards for willfulness and bad faith. The City appeals the judgment awarding the firefighters a substantial unpaid wages recovery. We reverse and render judgment for the City on the firefighters' regular rate claims, but we remand the claims by the Fire Captains, Fire Division Chiefs, and Fire Battalion Chiefs that they were improperly exempted from FLSA overtime requirements.

DISCUSSION

I. Determining the Regular Rate under the FLSA.

The regular rate is the hourly rate actually paid to the employee for the normal, non-overtime work week for which he is employed. *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203, *modified*, 331 U.S. 795 (1947); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944). The regular rate is a rate per hour, but employers are not required to compensate employees on an hourly basis. 29 C.F.R. § 778.109 (1993). If an employee is employed on a salary basis, his regular hourly rate is computed by dividing the salary by the number of hours for which the salary is intended to compensate. 29 C.F.R. § 778.113 (1993).

The firefighters were paid based on the number of hours they worked, but the hourly rate was based on a designated "base salary" indicated in the MOAs. The dispute centers on the number of hours the designated salary was intended to cover. The firefighters claim that it was only intended to cover non-overtime hours. The City contends that it was intended to cover 112 hours, which includes some overtime hours. The MOAs support the

City's contention because the hourly rates indicated in the MOAs are equivalent to the salaries indicated in the MOAs divided by 112.

The district court concluded as a matter of law that the City's calculation for the regular rate could not be correct, because overtime hours could not be used in calculating the regular rate. This interpretation is clearly inconsistent with FLSA regulations. The regulations provide that a base salary used to calculate a regular rate can be intended to cover more than 40 hours in one week and the regulations illustrate how to deal with the calculation of the regular rate in such a case. 29 C.F.R. § 778.325 (1993). The example given in the regulations states:

> If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and the statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55. *Id.*

The City claims, and the MOAs indicate, that this was the type of arrangement agreed to by the City and the firefighters. The bi-weekly salaries found in the MOAs were intended to cover 112 hours of work for each pay period. Therefore, the regular rate consisted of the MOA-designated bi-weekly salary divided by 112. The MOA bi-weekly salary compensated the firefighters at that rate for up to 112 hours of work. If a firefighter worked a total of 112 hours, some of those hours would be considered overtime hours, and therefore, the firefighters would also receive one-half the regular rate for each

of those hours. Any hours worked over 112 were all overtime hours and the firefighters would be entitled to one and one-half times the regular rate for those hours. This pay scheme is clearly consistent with the FLSA regulations.

The district court held that such a method of computing the regular rate was invalid as a matter of law because overtime hours cannot be used in computing the regular rate of pay. In coming to this conclusion, the district court relied on *149 Madison Ave. Corp.*, 331 U.S. 199 (1947). In that case, the Supreme Court stated that the regular rate is the rate actually paid for the "normal, non-overtime workweek." *Id.* at 204. In referring to the "normal, non-overtime workweek" the Court was not discussing how to compute the regular rate from a salary, but was stating that the object of that computation is to determine what rate was being paid for the non-overtime workweek unaffected by any inflated rate paid for overtime work hours. The implication of the Supreme Court's statement is not, as the district court concluded, that overtime hours cannot be used when deriving the regular rate from a salary. Indeed, the Court also stated that,

> A wage plan is not rendered invalid simply because instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom. *Id.*

If a designated base salary is intended to cover overtime hours as well as non-overtime hours, it is necessary to divide the salary by the total hours and not just the non-overtime hours because a failure to do so will result in a rate that is not representative of the rate actually paid for the "normal, non-overtime workweek." The Supreme Court has stated that if a salary includes a premium for overtime work, it must be deducted before dividing the salary by the number of hours worked so that the resulting rate is not inflated by the overtime premium. *Bay Ridge Operating Co. v. Aaron*, 68 S. Ct. 1186, 1196 (1948). The district court in this case apparently confused the concepts of overtime premiums and overtime hours.

In their appeal to this court, the firefighters apparently concede that the MOA salaries should be used to compute the regular rate. The firefighters also do not argue that overtime hours cannot be used in the divisor of the formula for determining the regular rate as a matter of law, as the district court held. The firefighters instead argue on appeal that the rate determined using 112 as the divisor is "fictitious" because 1) it includes "Kelly Days" which cannot be used to understate the hourly rate; and 2) it does not represent the parties' intent.

The firefighters argue that they have historically been given time off in order to reduce overtime. Because, they argue, these days off ("Kelly days") were meant to reduce overtime rather than provide compensated time off, they should not have been included in the divisor for purposes of calculating the regular rate. However, after reviewing the record, we believe that "Kelly days" were simply another form of paid vacation and, therefore,

properly included in hours to be compensated by the regular bi-weekly salary.

In support of their contention that the MOA salary was not intended to cover 112 hours of work, the firefighters point to the fact that their representative objected to the City's formula during negotiations for one of the MOAs. They also point to the fact that during MOA negotiations, the firefighters' attorney sent a letter to the City stating that the firefighters acknowledged the City's formula for determining the regular rate, as evidenced in the particular MOA being negotiated at the time, but also stating that the "Union is not waiving its right to additional compensation should a court of competent jurisdiction later determine that [the City's formula] is in error." This statement does not change the fact that the firefighters signed the contract in question and both the City and the firefighters abided by its terms. In addition, on its face, the contract, including the City's formula for the regular rates does not violate the FLSA, giving a court of competent jurisdiction no reason to determine that it is in error.

The Supreme Court has held, however, that when determining the number of hours a salary is intended to cover, the contract between the parties is not necessarily determinative. *149 Madison Ave.*, 331 U.S. at 204, 67 S. Ct. at 1181. The Court stated that the regular rate is an " 'actual fact,' and in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do." *Id.* (citing *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424, 65 S. Ct. 1242, 1244 (1945)); *see also, Bay Ridge Operating Co.*, 334 U.S. at 464, 68 S. Ct. at 1195-96

(holding that the "words and practices under the contract are the determinative facts in finding the regular rate"). In *149 Madison Ave.*, the Court determined that the facts in that case showed that, although the contract stated that the hourly rate should be derived through the use of a formula stated in the contract, the hourly rate actually paid was not consistent with that formula. 331 U.S. at 208.

The district court in this case found that the firefighters were compensated for every hour worked. The firefighters do not contend that the rate actually received by them is not the rate specified in the MOAs nor do they contend that they did not receive one and one-half times that rate for every overtime hour worked. The firefighters merely argue that the rate specified in the MOAs, the rate actually received by them, was not a valid rate under the FLSA. The district court agreed because it erroneously concluded that, as a matter of law, overtime hours could not be used in calculating the regular rate. This interpretation of the FLSA is incorrect. The FLSA does not preclude the coverage of overtime hours in a salary used to compute the regular rate. If the parties intended a salary to cover overtime hours, the regular rate cannot be inflated by subtracting those hours from the number of hours divided into the salary. The contract in question, as well as the actual practices of the parties, clearly indicate that the base salaries in the MOAs were intended to cover a standard 56 hour work week or 112 hours per bi-weekly pay period. The regular rate so derived meets the minimum hourly wage requirements under the FLSA and all required overtime requirements were seemingly met by payment of time and one-half at that regular rate for all FLSA determined overtime hours. Therefore, the City's

method of payment to the rank and file firefighters did not violate the FLSA.

II. Executive Exemption

The Fire Captains, Fire Division Chiefs and Fire Battalion Chiefs have brought claims based on the fact that they were paid some overtime, but were not paid the amount of overtime that an employee protected by the FLSA would have received, because the City considered them "executive employees" exempt from FLSA requirements. The Captains and Chiefs contend, and the district court held, that they are not "executive employees" as defined in the FLSA.

The FLSA exempts any employee employed in a bona fide executive, administrative, and professional capacity from the overtime requirements of 29 U.S.C. §§ 206 and 207. 29 U.S.C. § 213(a) (1) (Supp. 1994). The employer has the burden of showing that its employees are exempt from the FLSA's overtime provisions. *Corning Glass Works v. Brennan*, 94 S. Ct. 2223, 2229 (1974). Federal regulations provide two tests for determining whether an employee qualifies for the executive exemption. 29 C.F.R. § 541.1 (1994). Under the "short test," exempt status is given to any employee:

> who is compensated on a salary basis at a rate of not less than $250 per week . . . , and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department of subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein. . . .

29 C.F.R. § 541.1(f).

It is undisputed that the Fire Captains and Chiefs received a bi-weekly salary equalling more than $250 per week. The district court found, however, that these employees could not be considered paid "on a salary basis" because of a City policy allowing for deductions in accrued leave for absences of less than a day. Because the court determined that the employees were not salaried, it did not reach the issue of whether the employees fulfilled the "duty" requirements under the short test.

Exemptions to the FLSA are to be narrowly construed; the employer must show that the employee fits "plainly and unmistakenly within the exemption's terms" – under both the "salary" test and the "duties" test. *See Reich v. State of Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993). An employer must prove that the employee is exempt by "clear and affirmative" evidence. *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984).

A. Salary Test

Under both the short and long test for the executive exemption, the employer must prove that the employees in question are paid on a salary basis rather than an hourly rate. 29 C.F.R. § 541.1(f); *see also Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990). According to 29 C.F.R. § 541.118(a) (1994), an employee is compensated on a salary basis if "under his employment agreement he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of

variations in the quality or quantity of the work performed."

The district court held that because the City had a policy requiring that absences of less than a day[1] be charged against accrued leave, the employees could not be considered salaried. Several circuits have held that policies penalizing an employee for absences of less than one day (at least when the penalty involved the possible loss of pay) indicate that employees subject to these policies are not salaried employees as defined by 29 C.F.R. § 541.118(a), and therefore, preclude exemption of these employees from FLSA requirements under 29 C.F.R. § 541.1. *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992); *Abshire*, 908 F.2d at 486. Other circuits have held that unless an employee's pay, as opposed to their compensatory leave, is actually docked, such a policy does not preclude exemption. *McDonnell v. City of Omaha*, 999 F.2d 293, 297 (8th Cir. 1993); *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991). We need not decide which of these two interpretations to adopt, because even the circuits requiring less than actual docking to preclude exemption, require an express policy that an employee's actual pay will be reduced in the event that accrued leave is exhausted. The record shows that none of the employees in question here

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[1] We find no allegations of docking for absences of greater than one day, in which case a distinction is drawn between different types of absences. *See generally* 29 C.F.R. § 541.118(a).

ever had their pay docked under such a policy. Only accrued leave was affected by days missed. Indeed, the firefighters have presented no evidence that the City had an *express* policy of docking pay for time missed. Thus, under either line of cases above, the City's policy of docking paid leave does not preclude salary status as a matter of law.

The district court also relied on the fact that the firefighters in question received compensation for overtime hours. The regulations provide however, that "additional compensation besides the salary is not inconsistent with the salary basis of payment." 29 C.F.R. § 541.118(b); see also 57 Fed. Reg. 37666, 37673 (indicating that overtime compensation falls within the meaning of the type of extra compensation allowed under 29 C.F.R. § 541.118(b)). The regulation uses commissions as an example of a type of additional compensation covered by the regulation, but there is nothing in the regulation which significantly distinguishes commissions (extra compensation resulting from superior productivity while working) from overtime (extra compensation for a greater number of hours worked).

The district court also pointed to the fact that the paystubs of the allegedly exempt employees indicated the number of hours covered by the pay check. Since overtime is not inherently inconsistent with one's status as a salaried employee, the fact that the firefighters' paystubs indicated the number of hours covered is also not inconsistent with salaried status. Such an accounting of hours is necessary to compute overtime compensation.

The City claims, and the firefighters do not dispute, that the chiefs and captains were paid a predetermined amount constituting at least part of their compensation. The MOAs and the salary ordinances set a biweekly salary, and not an hourly rate, for these employees. Neither the fact that their accrued leave could be deducted for absences, nor the fact that they were paid overtime, nor the fact that their paychecks indicated the number of hours covered contradicts the conclusion that they regularly received a "predetermined amount constituting . . . part of [their] compensation, which [was] not subject to reduction because of variations in the quality or quantity of work performed." 29 C.F.R. § 541.118(a). We therefore hold that the fire captains, fire battalion chiefs, and fire division chiefs were paid on a salary basis.

B. Duties Test

The short test in § 541.1 also requires that to fall under the executive exemption, the employees in question must: 1) have as their primary duty "the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof"; and 2) this duty must include "the customary and regular direction of the work of two or more other employees therein." 29 C.F.R. § 541.1(f).

In *Department of Labor v. City of Sapulpa*, we held that, as a "rule of thumb," an employee's primary duty is executive if the employee spends more than 50% of his or her time performing management type functions. 30 F.3d 1285, 1287 (10th Cir. 1994). The City contends that Chiefs

and Captains spend in excess of 80% of their work hours managing the subdivisions of the fire department over which each position has been given supervisory power. The firefighters contend that the Chiefs' activities do not constitute management because they have little or no discretion or independent judgment; no authority to hire, fire, promote, demote, suspend personnel, authorize shift trades, authorize transfers, give pay raises, or reduce pay; no authority to make policy determinations or make spending decisions or modify equipment. The firefighters also assert that the Battalion and Division Chiefs spend much of their time doing work clerical in nature, and they must participate in fitness training and fight fires and respond to medical emergencies along with the rank and file firefighters. We conclude that a genuine issue of fact is also raised with respect to the "duties" test.

The district court must determine what percentage of the Chiefs' and Captions' [sic] time is spent on management tasks. In *Sapulpa*, we noted that the regulations indicate various activities that are considered to be management duties. *Id.* (citing 29 C.F.R. § 541.102(b)). If on remand the court determines that the Chiefs or Captains spend less than 50% of their time on management functions, however, a four-factor analysis must be applied by the district court to determine whether the employees may nevertheless be considered supervisory. *Id.* These four factors include: 1) the relative importance of management as opposed to other duties; 2) the frequency with which the employee exercises discretionary powers; 3) the employee's relative freedom from supervision; and 4) the

relationship between the alleged exempt employee's salary and wages paid to other employees for similar non-exempt work. *Id.*

The district court's judgment is REVERSED. We DISMISS the firefighters' claims that the City calculated an improper FLSA "regular rate," and we REMAND the claims by the Fire Captains, Fire Division Chiefs, and Fire Battalion Chiefs that they were improperly exempted from FLSA overtime requirements for further proceedings consistent with this opinion.

REVERSED AND REMANDED IN PART.

APPENDIX B

Ronald L. AARON, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs,

v.

The CITY OF WICHITA, KANSAS, Defendant.

No. 90-1536-K.

United States District Court,
D. Kansas.

June 17, 1992.

Current and former fire fighters brought action against city for unpaid compensation, unpaid overtime compensation, liquidated damages and attorney fees alleging violations of Fair Labor Standards Act (FLSA). City moved for summary judgment. The District Court, Patrick F. Kelly, Chief Judge, held that: (1) action was not barred by limitations; (2) city violated FLSA with respect to fire operations division personnel; and (3) genuine issue of material fact existed as to whether violation was willful, precluding summary judgment.

Motion granted in part and denied in part.

Ronald D. Innes, Charles W. Harris, Curfman, Harris, Rose & Weltz, Wichita, Kan., for plaintiffs.

Richard D. Ewy and Gloria G. Flentje, Foulston & Siefkin, Gary Rebenstorf, City Atty., Wichita, Kan., for defendant.

MEMORANDUM AND ORDER

PATRICK F. KELLY, Chief Judge.

This is an action by current and former fire fighters of the Operations/Fire Suppression Division of the Wichita Fire Department against the City of Wichita (City) for unpaid compensation, unpaid overtime compensation, liquidated damages and attorney fees. In their motion for partial summary judgment, plaintiffs contend the City has violated the requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, by failing to compensate them for all hours worked, by using an artificial hourly rate as the regular rate for the purpose of computing straight time and overtime compensation, and by classifying those plaintiffs with the ranks of fire captain, fire battalion chief, and division fire chief as executive employees who are exempt from the overtime requirements of the FLSA. Plaintiffs also allege a willful violation of the FLSA. In its motion for summary judgment, the City argues that plaintiffs' claims are barred by the statute of limitations, that plaintiffs were fully compensated for every hour worked, that plaintiffs' regular rate of pay was properly calculated, and that the fire captains, battalion chiefs and division chiefs were executive employees and therefore properly excluded from the FLSA overtime requirements.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary

judgment, the court must resolve all disputed facts in favor of the party resisting summary judgment. *White v. General Motors Corp., Inc.*, 908 F.2d 669, 670 (10th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991). Summary judgment shall be denied if the moving party fails to demonstrate its entitlement beyond a reasonable doubt. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir.1980).

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1988). In resisting a motion for summary judgment, the nonmoving party may not rely upon mere allegations, or denials, contained in its pleadings or briefs. Rather, the party must come forward with specific facts showing the presence of a genuine issue for trial. *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir.1990). One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex*, 477 U.S. at 323-24, 106 S.Ct. at 2553.

A hearing on the motions was held on May 28, 1992. The court now makes the following findings of fact and conclusions of law. For the reasons stated herein, plaintiffs' motion for partial summary judgment is granted in part and denied in part. Further, the City's motion for summary judgment is granted in part and denied in part.

Issue One

The City's fire department has three major divisions: an administrative division, an operations division and a fire prevention division. Plaintiffs are, or have been, employed by the City as fire suppression officers in the operations division of the fire department.

Plaintiffs are, or have been, members of the International Association of Fire Fighters (IAFF). Fire fighters represented by the IAFF are in the pay classifications of 721, 722 and 724, and hold the job titles of fire recruits, fire fighters, fire lieutenants, fire prevention inspectors I, fire prevention training instructors I, and fire investigators I. Excluded from the bargaining unit are fire personnel officers holding the rank of fire captain or above. Compensation and other work-related conditions of the fire personnel represented by the IAFF have been determined by a bargained-for Memorandum of Agreement (MOA) which has been negotiated between the City and the IAFF each year until 1991.

In each of the negotiated agreements from 1987 through 1990, the pay schedule for fire recruits, fire fighters and fire lieutenants was detailed as an hourly rate. Also evident from the agreements and schedules are the biweekly rates of pay. Employees of the operations division work shifts of 24 hours on duty followed by 48 hours off duty. Accordingly, an operations officer who works every third day as scheduled works an average of 56 hours per week or 2,912 hours annually. In contrast,

fire fighters assigned to the administrative and prevention divisions work a 40-hour week or 2,080 hours annually.

Under the applicable MOAs, operations division personnel who worked an average 56-hour week were compensated at the same biweekly and annual rates as the fire prevention division personnel in the same grade and step. None of the MOAs between the City and the IAFF distinguished between the base compensation of employees who worked 56 hours a week and those who worked 40 hours per week. It is this pay differential between 56-hour employees and 40-hour employees which is the basis for the plaintiffs' first claim.

Plaintiffs assert that the City has violated the requirements of the FLSA by not compensating them for every hour worked during each of the 24-hour tours of duty per pay period. Plaintiffs' argument is premised on the fact that the base compensation for operations officers was not adjusted upon the effective date of the FLSA in 1986. They assert that prior to 1986 all hours on duty were not considered hours worked because of the non or low productivity of some of the hours. Thus, since operations officers spent time sleeping, eating and waiting while on duty, they were compensated at the same rate as 40-hour a week employees. Plaintiffs conclude, therefore, that they have been compensated for only 40 hours of work, not 56 hours. Accordingly, plaintiffs argue that the City's failure to adjust this pay policy upon enactment of the FLSA, except for annual adjustments applied to all employees, violates the FLSA requirement that the City compensate the fire fighters for every hour worked.

The first aspect of this issue which the court addresses is the City's assertion that plaintiffs' claim is barred by the applicable statute of limitations. The statute of limitations governing FLSA claims provides for a two-year limitation period in most circumstances and a three-year limitation period for willful violations. 29 U.S.C. § 255(a).

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 *reh'g denied*, 471 U.S.1049, 105 S.Ct. 2041, 85 L.Ed.2d 340 (1985), the Supreme Court held that municipalities were subject to the FLSA. Congress responded by amending the FLSA to delay enforcement against state and local governments until April 16, 1986. *Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102, 1103 (5th Cir.1990). The City argues that any alleged violation of the compensation provisions of the FLSA occurred on April 16, 1986, the effective date of the FLSA. Under the City's argument, plaintiffs' action, filed on November 14, 1990, is outside the applicable statute of limitations. Plaintiffs argue that the statute of limitations has not run because the City's continued course of conduct has resulted in noncompliance with the FLSA, and each repetitive nonpayment for hours worked constitutes a new cause of action.

The continuing violation doctrine applies in two situations: when the original violation is outside the statute of limitations but closely related to other violations that are not time barred, and when the initial violation outside the statute of limitations is repeated at a later date. *Hendrix*, 911 F.2d at 1103. In the first instance, recovery is allowed for all violations, while in the second case each violation begins the statute of limitations anew and

recovery is limited to those violations that occur within the period of limitations. *Id.*

In *Hendrix*, Yazoo City reduced the base salary of its fire fighters in order to ameliorate the effects of the FLSA requirements. 911 F.2d at 1103. The fire fighters did not bring their action against the city until three years and one month had passed. *Id.* In determining whether the reduction constituted a single violation barred by the statute of limitations, or whether each affected paycheck constituted a violation, the court examined the practice at issue to see if it was part of a past discriminatory act or whether it was facially neutral and merely gave effect to a prior act of discrimination. *Id.* at 1104. The *Hendrix* court noted that the plaintiffs were fully aware of the reduction in their base rate of pay when they received their April 16, 1986 paychecks. *Id.* at 1105. It concluded that the reduction in pay was the violation and the subsequent paychecks simply gave continued effect in a facially neutral manner. Thus, there was no continuing violation and the action was barred by the statute of limitations. *Id.*

In contrast, the court in *Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261 (5th Cir.), *modified*, 826 F.2d 2 (1987), found that the defendant's failure to compensate plaintiff in accordance with the FLSA provisions constituted a continuing violation. Therein, the court held that a separate cause of action accrued at each regular payday immediately following the work period for which the services were rendered and for which the wage or overtime compensation was claimed. *Id.* at 271. This conclusion was based upon the rationale that any other holding would permit perpetual wage discrimination by an employer whose violations had already lasted two years

without attack. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 121, 38 L.Ed.2d 55 (1973); *see also Jenkins v. Home Ins. Co.*, 635 F.2d 310 (4th Cir.1980) (discriminatory lower payment every two weeks constituted continuing violation that ceased only at end of plaintiff's employment).

This court believes the reasoning of *Hodgson v. Behrens Drug Co.* and its prodigy is the appropriate rationale for determining whether a continuing alleged violation occurred in the present case. Although the facts reveal that plaintiffs were aware, or should have been aware, of the City's alleged compensation violation in April, 1986, their claim is not barred by the statute of limitations. Plaintiffs have shown that the alleged compensation violation was a continuing policy and practice of the City which resulted in a series of alleged violative acts. Thus, each paycheck which perpetuated the original alleged violation constituted a new cause of action. To find otherwise would allow the City to continue with its alleged violations of the FLSA.

In addition, the City contends that plaintiffs' claim for unpaid hours does not relate back to the date the suit was originally filed, November 14, 1990. It asserts that plaintiffs did not raise any form of an unpaid hours claim until August 19, 1991, and that plaintiffs' present claim did not appear until December 23, 1991, in their third amended complaint.

Upon examination of the pleadings, this court agrees with the City that no mention of the unpaid hours claim appeared in any form of the plaintiffs' original complaint. Accordingly, the applicable statute of limitations bars

recovery for any alleged violations of the FLSA by the City for unpaid hours which occurred prior to August 19, 1989. The court notes, however, that the issue presented is moot in light of the conclusion discussed below. In accordance with the court's determination that each paycheck received by plaintiffs constituted a new cause of action for the alleged violation of the FLSA, plaintiffs are entitled to recover for any violations which occurred in the two years preceding August 19, 1989. The issue of willfulness and the extension of the statute of limitations for that reason is discussed below.

As for the substantive issue of count one of plaintiffs' complaint, the City does not deny that it is statutorily required to compensate its employees for all hours worked. It argues, however, that the MOAs entered into between the IAAF [sic] and the City since 1977 provide evidence that plaintiffs were paid an hourly rate for 56 hours per week. The City asserts that plaintiffs were paid for every hour worked and received overtime compensation in accordance with the FLSA for those hours worked in excess of 204 hours each pay period. The City does not deny that operations officers and 40-hour-a-week officers received the same annual and biweekly rates of compensation. However, it contends that this fact merely shows the plaintiffs were paid a lower hourly rate than other fire fighters. The City asserts that the variance in the hourly rates of compensation between operations officers and other officers is attributable to the different functions performed by the employees. The City recognizes that operations officers are on duty during periods of low productivity; therefore, these employees receive a lower hourly rate of compensation than the 40-hour-a-week

officers who are expected to work at a higher level of productivity during their hours on duty.

Plaintiffs' claim that they are not compensated for every hour worked is without merit. The FLSA does not require an equal rate of compensation between the operations officers and other officers in the fire department. Thus, it is clear that plaintiffs, who work more hours in a week than other fire department officers, but who receive the same annual and biweekly compensation as the other officers, receive a lower hourly rate of compensation. *Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 580, 62 S.Ct. 1216, 1221, 86 L.Ed. 1682 *reh'g denied,* 317 U.S. 706, 63 S.Ct. 76, 87 L.Ed. 563 (1942). As long as plaintiffs' hourly wage meets the minimum wage requirements, there is no violation of the FLSA. Plaintiffs' argument that the City failed to adjust its compensation plan upon enactment of the FLSA infers that an upward adjustment was required. However, no adjustment was required where the existing pay plan complied with the FLSA requirements.

In addition, the court looks to the effective MOAs to determine whether plaintiffs were compensated for all hours worked. The MOAs show that plaintiffs were entitled to overtime compensation for all hours worked over their regular schedule, thereby indicating that plaintiffs were paid for every hour worked. The main thrust of plaintiffs' argument is that operations fire fighters were not regularly scheduled to work 56-hour weeks but only 54 hours per week due to four compensated days off each year. This argument, however, discredits plaintiffs' own assertions and is relevant only in association with the computation of the regular rate of compensation and

overtime compensation. The facts presented to this court establish that plaintiffs agreed to work an average 56-hour week and have been compensated for every hour worked. The court finds that the amount of compensation paid to the operations fire fighters is a matter for negotiation between the fire fighters' union representatives and the City, so long as the rate of compensation complies with the FLSA minimum requirements. Accordingly, summary judgment is granted in favor of the City.

Issue Two

In plaintiffs' third claim, they assert the City has used an artificial regular rate for computing base and overtime compensation, thereby understating the amount of compensation due.

Because of the unique concept of "tour of duty" under which fire fighters are employed, Congress created an exception to the usual "hours of work" rules applied in the determination of overtime compensation. Under 29 U.S.C. § 207(k)(2), a fire fighter who works 24-hour tours of duty in a 27-day work period is entitled to overtime compensation at one and one-half times the regular rate at which he is employed for all hours worked over 204 hours in the pay period. *See,* 29 C.F.R. § 553.230(c).

The regular rate at which an employee is employed includes all remuneration for employment paid to, or on behalf of, the employee, except payments specifically excluded by statute. 29 U.S.C. § 207(e). The regular rate is the hourly rate actually paid to the employee for the normal, nonovertime work week for which he is employed. *149 Madison Ave. Corp. v. Asselta,* 331 U.S. 199,

204, 67 S.Ct. 1178, 1181, 91 L.Ed. 1432 *modified*, 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947); *Walling v. Helmerich & Payne*, 323 U.S. 37, 40, 65 S.Ct. 11, 13, 89 L.Ed. 29 (1944). The regular rate is a rate per hour, although the FLSA does not require employers to compensate employees on an hourly basis. 29 C.F.R. § 778.109. If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his regular rate. 29 C.F.R. § 778.110. If the employee is employed on a salary basis, however, his regular hourly rate of pay is computed by dividing the salary by the number of hours for which the salary is intended to compensate. 29 C.F.R. § 778.113.

With these requirements in mind, the court examines the method and manner of calculation utilized by the City to compute the plaintiffs' regular rate, and plaintiffs' assertions that such method is improper.

In order to calculate the regular hourly rate of operations officers, the City divides each plaintiff's annual compensation by 2,912 (56 hours x 52 weeks), the number of hours worked annually. The regular hourly rate determined by this method is the same hourly rate listed in the pay schedules of the relevant MOAs.

Plaintiffs contend that the divisor of 2,912 is an inflated number of hours worked because it includes overtime hours and hours attributable to Kelly days and vacation days.

The court first considers plaintiffs' contention that overtime hours are included in the computation of plaintiffs' regular hourly rate. Plaintiffs argue that an operations officer who works all nine shifts of 24 hours each in a 27-day pay period works a total of 216 hours. However,

since the MOAs and FLSA require overtime compensation for all hours worked over 204 hours, there are 12 overtime hours in each pay period. 12 overtime hours in each pay period constitute 162 overtime hours annually. Plaintiffs urge that the 162 hours of overtime should be deducted from the hours worked divisor so that the annual salary is divided by 2,750 hours rather than 2,912 hours.

The court finds merit in plaintiffs' argument. In *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204, 67 S.Ct. 1178, 1181, 91 L.Ed. 1432 (1946), the United States Supreme Court declared that the regular rate should be derived from the normal *nonovertime* work week. 331 U.S. at 204. In the instant case, the City's inclusion of the overtime hours in its calculation of plaintiffs' regular rate violates the rule espoused in *Asselta*. Under the City's method of calculation, plaintiffs' regular rate is understated and, correspondingly, the rate of overtime compensation is understated.

Next, the court addresses plaintiffs' claim that the inclusion of Kelly hours and vacation hours in the City's calculation of the regular rate understates the regular hourly rate. Plaintiffs assert that the 96 hours which represent Kelly hours should be subtracted from the divisor of 2,912 so that the annual compensation of operations officers would be divided by 2,816 hours.

A Kelly day is a 24-hour period which is paid but which the officer does not have to work. Each officer is allowed four Kelly days per year; however, only one Kelly day may be used in a quarter. Evidence submitted

indicates the Kelly day policy was adopted by the City in order to keep overtime compensation at a minimum level.

29 U.S.C. § 207(e) provides seven statutory exceptions to the remuneration included in the calculation of an employee's regular rate of pay. Subsection (e)(2) specifically provides that "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause" shall not be included in an employee's regular rate. In addition, an employee's regular rate shall not include "extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, . . ." 29 U.S.C. § 207(e)(6).

The City apparently believes the mandates of 29 U.S.C. § 207(e) are optional. It argues that instead of excluding the Kelly hours from the calculation of plaintiffs' regular rate, it includes the compensation the Kelly hours represent and then offsets the hours they represent. The City's method, however, credits the compensation for Kelly hours to its overtime compensation liability which is prohibited by the FLSA. 29 C.F.R. § 778.218(a). Under the City's method of calculation, the plaintiffs' regular rate is determined by dividing the annual compensation by the hours worked, including overtime hours, plus the Kelly hours and vacation hours. The City argues that if the Kelly hours are excluded from the calculation of plaintiffs' regular rate, then the compensation which those hours represent must also be excluded from the annual compensation, thereby resulting in the same regular rate as derived from the inclusion of Kelly hours in the present method of computing regular rate.

Upon an in-depth examination of the record, the court concludes that the City has improperly calculated the regular rate of plaintiffs' compensation. The court has already noted that the inclusion of overtime hours in the calculation of regular rate compensation is prohibited. Thus, the divisor representing the annual hours of work must be reduced by 162 hours, the overtime hours represented in the divisor 2,912. In addition, the court finds that the inclusion of Kelly day hours and vacation day hours in the calculation of regular rate is statutorily prohibited. 29 U.S.C. § 207(e)(2). Accordingly, the 96 hours which represent Kelly hours must also be subtracted from the divisor 2,912. Thus, the number of annual hours worked in the computation of plaintiffs' regular rate of pay cannot exceed 2,654. This figure, however, does not account for individual vacation hours which must also be subtracted from the annual hours worked.

It is therefore ordered that the City take the necessary steps to recalculate the plaintiffs' regular rate of compensation in accordance with the method described. The regular rate of compensation of individual plaintiffs shall be computed in the following manner: the annual compensation of individual fire fighters shall be divided by the total number of hours worked (2,912), less overtime hours (162), Kelly hours (96), and variable vacation hours. The City is further ordered to reimburse plaintiffs for straight time hours and overtime hours which were understated and under compensated due to miscalculation of the regular rate of compensation. Summary judgment is granted in favor of the plaintiffs.

Issue Three

The plaintiffs in claim two of the fourth amended complaint are captains, battalion chiefs, and division chiefs who work in the operations division of the fire department. These plaintiffs claim that the City has violated the overtime compensation requirements of the FLSA by classifying them as executive employees who are exempt from the overtime requirements of the FLSA. 29 U.S.C. § 207(a)(1) and (k)(2). The City denies overtime liability on the basis that these plaintiffs are executive employees and therefore exempt from the overtime requirements. 29 U.S.C. § 213(a)(1).

The basic principles governing exemptions under the FLSA are well settled. The employer has the burden of proving the executive exemption applies and that the employee fits "plainly and unmistakenly within the exemption terms." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1 (1974); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 *reh'g denied*, 362 U.S. 945, 80 S.Ct. 803, 4 L.Ed.2d 772 (1960); *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). This burden must be satisfied by clear and affirmative evidence. *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir.1984). In addition, the exemption must be narrowly construed against the employer in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 264, 3 L.Ed.2d 243 (1959); *Abshire*, 908 F.2d at 485.

The FLSA exempts any employee employed in a bona fide executive, administrative, or professional capacity from the overtime requirements of 29 U.S.C. §§ 206 and 207. 29 U.S.C. § 213(a)(1). Federal regulations provide two tests for determining whether an employee qualifies for the executive exemption: the "short" test and the "long" test. 29 C.F.R. § 541.1. (1991).

§ 541.1 provides that a bona fide executive employee shall mean any employee:

> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent, . . . of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this subsection . . . ; and
>
> (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . : *Provided,* That an employee who is

> compensated on a salary basis at a rate of not less than $250 per week . . . , exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

Under the "long" test, the employer must establish all five elements of the regulation. 29 C.F.R. § 541.1(a) through (e). Under the "short" test, however, the employer need only establish the requirements of subsection (f). Accordingly, the court will first apply the "short" test to determine whether the City has proven by clear and affirmative evidence that the operations division fire captains, fire battalion chiefs, and fire division chiefs are exempt employees under the regulation requirements.

The "short" test requires that an employee: (1) be compensated on a salary basis at a rate of at least $250 per week; (2) whose primary duty is management; and (3) who regularly directs the work of two or more other employees.

The first issue upon which the City and exempted plaintiffs disagree is whether the plaintiffs are compensated on a salary basis or an hourly basis. The City must prove that the plaintiffs are paid on a salary basis rather than an hourly rate; otherwise it cannot claim the plaintiffs are executive employees. *Abshire*, 908 F.2d at 486; *Thomas v. County of Fairfax, Va.*, 758 F.Supp. 353 (E.D.Va.,

1991); *York v. City of Wichita Falls, Tex.*, 727 F.Supp. 1076, 1082 (N.D.Tex., 1989).

Plaintiffs admit that fire captains, fire battalion chiefs, and fire division chiefs are compensated at a rate exceeding $250.00 per week. They deny, however, that they are compensated on a salary basis and assert instead that they are compensated on an hourly basis. In support of their position, the plaintiffs show that the City keeps track of hours worked to an accuracy of 1/10 of an hour and that pay stubs attached to each pay check are computed on an hourly basis. In addition, these pay stubs showed an hourly rate of pay until March, 1991. Plaintiffs also assert that the receipt of overtime compensation indicates an hourly wage. Finally, plaintiffs argue that the City's past policy of deducting absences of less than a day from vacation, sick leave or other compensatory days supports their contention.

In defense of its pay policy, the City baldly asserts that the captains, battalion chiefs and division chiefs are compensated on a salary basis. It argues that these plaintiffs receive a predetermined portion of their salary every two weeks, and therefore are compensated on a salary basis of no less than $250.00 per week. The City further asserts that these plaintiffs are required to keep track of their hours for the purpose of public accountability and governmental use.

Federal regulation 29 C.F.R. § 541.118(a) (1991) provides guidance in determining whether an employee is compensated on a salary basis. It provides in pertinent part:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of the work performed.*

(Emphasis added.)

In *Thomas*, 758 F.Supp. 353, the court examined the compensation pay plan of the defendant county to determine if it unlawfully exempted its fire lieutenants from the FLSA overtime requirements. The *Thomas* court determined that the language of 29 C.F.R. § 451.118(a), relating to variations in work performed, suggested that an employee's pay must not bear a direct causal relationship to the quality or quantity of work performed. *Id.* at 360. Thus, the lieutenants' pay, which varied with each paycheck depending on the number of hours actually scheduled to work, was found to be an hourly wage rather than a salary. *Id.* at 361. Additional factors which the court found indicative of an hourly wage were the fact that the lieutenants' pay was calculated by multiplying the time on the pay stub by the hourly rate, and that the lieutenants received additional compensation at an hourly rate for the hours worked beyond the regular schedule. *Id.* at 364-65.

In the present case, the evidence shows that plaintiffs' pay stubs varied by the number of hours worked in the pay period. This variation in pay indicates the compensation was linked to the number of hours worked.

Abshire, 908 F.2d at 486 (salaried employee not compensated for amount of time spent on job, but rather for the general value of services performed). In addition, the facts show that plaintiffs received additional compensation, i.e., "premium pay," for overtime hours and holidays which they worked outside of their regularly scheduled hours of duty. Such additional compensation for extra hours worked is not generally consistent with salaried status. *Id.; see Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3d Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988); *Service Employees Intern. Union, Local 102 v. County of San Diego*, 784 F.Supp. 1503 (S.D.Cal., 1992); *York v. Wichita Falls*, 727 F.Supp. 1076, 1082 (N.D.Tex., 1989) (overtime pay leads to conclusion that employer has treated employees as nonexempt employees). Finally, the court notes that any absence by plaintiffs of less than a day was charged against other compensatory time; however, no pay check was ever reduced by the absence. This reduction of compensatory time for absences from work is as contrary to the notion of salaried status as the docking of base pay. *Id.* at 1510. Consequently, the reduction is one more factor lending itself to the conclusion that plaintiffs were not salaried employees.

For the above reasons, the court finds as a matter of law that plaintiffs are not salaried employees within the meaning of 29 C.F.R. § 541,118(a). The City's failure to meet its burden under the "short" test renders it unnecessary for the court to address the primary duty prong of the regulatory test. The court therefore holds that fire captains, fire battalion chiefs and fire division chiefs are

not salaried employees and thus are not bona fide executives exempt from the provisions of the FLSA. Accordingly, the City is ordered to recalculate the plaintiffs' compensation in accordance with the overtime requirements of the FLSA. Accordingly, summary judgment is granted in favor of the plaintiffs.

Issue Four

Plaintiffs' fourth claim alleges willful violation of the FLSA by the City in its use of an alleged inflated regular rate for the computation of overtime compensation as fully pled in claim three of plaintiffs' fourth amended complaint. Pursuant to 29 U.S.C. § 255(a), the statute of limitations shall be extended to three years for willful violations of the FLSA. Further, 29 U.S.C. § 216(b) provides that employers who violate § 207 of the FLSA shall be liable for unpaid compensation, unpaid overtime compensation and an additional equal amount in liquidated damages if the violation is deemed willful. A violation is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was permitted by the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 1681, 100 L.Ed.2d 115 (1988).

Plaintiffs allege the City intentionally or with reckless disregard relied upon an inflated hourly rate to determine overtime compensation. In support of their argument, the plaintiffs rely upon the deposition testimony of the assistant personnel director in 1985 who stated that it was not necessary to refer to any regulations regarding the establishment of the regular rate because it was already in the computer. In addition, plaintiffs show

that the City was advised by the Department of Labor that its calculation of regular rate was properly calculated prior to July 10, 1985. The Department of Labor opinion letter stated that the regular rate should be determined by excluding the payment for Kelly hours from the 27-day salary and dividing the result by the actual number of hours worked in the work period. The letter further stated that the regular rate could not be based on an artificial number of hours worked; however, this statement was made in reference to a 19-day work period with 144 scheduled hours. In further support of their position that the City willfully or recklessly violated the FLSA, plaintiffs rely upon the deposition testimony of Ray Trail, assistant city manager, that the City did not seek or rely upon the advise of counsel in adopting its method of calculating plaintiffs' regular rate of compensation. Finally, plaintiffs point to interdepartment memoranda which indicate that the former fire chief had advised the City of problems in its method of calculation and possible resistance by union representatives.

The City, of course, strongly denies plaintiffs' allegations and provides documents and deposition testimony in favor of its position. In particular, the City relies upon the Department of Labor opinion referred to above.

This court has previously found that issues of willfulness and party intent cannot be resolved by summary judgment. *Wahl v. City of Wichita, Kan.*, 725 F.Supp. 1133, 1147 (D.Kan., 1989). In the present case, the innocence or willfulness of the violation of the FLSA asserted in count III of the complaint is controverted by the parties. Examination of the record reflects the controversy evident on whether or not the City acted in a willful or reckless

manner in its calculation of plaintiffs' regular rate of compensation. Hence, this court cannot conclude as a matter of law that the City did or did not act in a willful or reckless manner. Accordingly, the intent of the City is an issue which remains to be resolved. Nevertheless, due to the numerous issues of complexity presented in this case, the court will grant, *sua sponte*, a rehearing on the issue of willful violation of the FLSA in order to more fully contemplate the facts and arguments. Accordingly, judgment on the issues of willful violation, extension of the statute of limitations and liquidated damages is suspended until the rehearing has been held.

IT IS THEREFORE ORDERED this 17th day of June, 1992, that plaintiffs' motion for partial summary judgment (Dkt. No. 40) is granted in part and denied in part.

IT IS FURTHER ORDERED that the City of Wichita's motion for summary judgment (Dkt. No. 39) is granted in part and denied in part.

IT IS FURTHER ORDERED that the City of Wichita shall make a complete and accurate accounting, in consultation with plaintiffs' counsel, of all overtime compensation due each plaintiff subject to the outcome of rehearing or trial on the issue of willfulness.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD L. AARON, et al., on Behalf of Themselves and All Others Similarly Situated,	)	
Plaintiffs,	)	No. 90-1536-PFK
vs.	)	
THE CITY OF WICHITA, KANSAS,	)	
Defendant.	)	

MEMORANDUM AND ORDER

(Filed March 9, 1993)

Plaintiffs, current and former fire fighters of the Operations/Fire Suppression Division of the Wichita Fire Department, brought this action against the City of Wichita (City) alleging violations of the Fair Labor Standards Act (FLSA). On June 17, 1992, this court entered a memorandum and order in response to plaintiffs' motion for partial summary judgment and the City's motion for summary judgment. Plaintiffs had moved for partial summary judgment on several issues, including the payment of compensation for all hours worked, the computation of the regular rate, and whether the ranks of fire captain, fire battalion chief, and division fire chief, as executive employees, are exempt from the overtime requirements of the FLSA. The City had moved for summary judgment claiming plaintiffs' claims were barred by the statute of limitations, plaintiffs were fully compensated for every

hour worked, plaintiffs' regular rate of pay was properly calculated, and that the captains, battalion chiefs, and division chiefs were executive employees and thus properly excluded from the FLSA overtime requirements.

First, the court found the plaintiffs' claim of nonpayment for hours worked was not barred by the statute of limitations. The court, however, held the "plaintiffs agreed to work an average 56-hour week and have been compensated for every hour worked." *Aaron v. City of Wichita*, No. 90-1536-K, slip op. at 10 (June 17, 1992).

Next, the court found "the City's inclusion of the overtime hours [12 overtime hours per pay period, 162 overtime hours annually] in its calculation of plaintiffs' regular rate violates the rule espoused in [*149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1946)]." *Aaron*, slip op. at 13. In addition, Kelly day hours and individual vacation hours should also be subtracted from the City's divisor of 2,912 when calculating the regular rate of pay. Thus, the regular rate of compensation of individual plaintiffs was ordered to be computed by dividing the total number of hours worked (2,912), less overtime hours (162), Kelly hours (96), and variable vacation hours. *Aaron*, slip op. at 15.

The court then addressed the issue of whether captains, battalion chiefs, and division chiefs were employees who are exempt from the overtime requirements of the FLSA. These plaintiffs were found to be paid at an hourly rate, as shown by their pay stubs, until March 1991. This hourly-rate salary varied by the number of hours worked in the pay period. Furthermore, these

"plaintiffs received additional compensation, i.e., 'premium pay,' for overtime hours and holidays which they worked outside of their regularly scheduled hours of duty." *Aaron*, slip op. at 20. The court concluded captains, battalion chiefs, and division chiefs are not salaried employees within the meaning of 29 C.F.R. §541.118(a) and ordered the City to recalculate these plaintiffs' compensation in accordance with the overtime requirements of the FLSA.

Finally, the court examined the plaintiffs' claim that the City willfully violated the FLSA, and therefore plaintiffs were entitled to extend the statute of limitations for calculating damages from two years to three years. Closely related to this issue was plaintiffs' contention that they were entitled to liquidated damages. Based upon the evidence before it, the court held it could not conclude as a matter of law that the City did or did not act in a willful or reckless manner. Thus, the court ordered, *sua sponte*, a rehearing on the issue of willful violation of the FLSA. *Aaron*, slip op. at 23. This issue of willful violation will be addressed by the court now that it has the benefit of additional briefing by the parties.

Since the court's June 17, 1992, memorandum and order, the City moved for reconsideration, modification, and clarification of that memorandum and order. (Dkt. No. 72.) Plaintiffs moved for partial summary judgment on the issues of whether the City willfully violated the FLSA by exempting plaintiffs of the ranks of captain, battalion chief, and division chief, and whether those plaintiffs would be permitted to recover liquidated damages because the City had not acted in good faith. (Dkt. No. 81.) Plaintiffs also filed a brief in support (Dkt. No.

82) of their motion for partial summary judgment on count three of the fourth amended complaint, on the issue of whether nonexempt employees were entitled to liquidated damages, and whether the City had willfully violated the FLSA in its payment to these plaintiffs. (See Pltfs.' Motion for Partial Summ. Judg., Dkt. No. 40 at 5-6.) This is the same issue upon which the court ordered a rehearing.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When considering a motion for summary judgment, the court must resolve all disputed facts in favor of the nonmoving party. *White v. General Motors Corp., Inc.*, 908 F.2d 669, 670 (10th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3441 (1991). The moving party must prove beyond a reasonable doubt that it is entitled to summary judgment. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element of the case to which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of some disputed facts does not automatically preclude granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule

should be interpreted in a way that allows it to accomplish this purpose. *Celotex*, 477 U.S. at 323-24.

A hearing on these motions was held March 1, 1993. The court now makes the following findings of fact and conclusions of law.

Defendant's Motion for Reconsideration

Regular Rate

The City asks the court to reconsider its determination that the nonexempt plaintiffs (fire fighters and fire lieutenants) are paid on an hourly or salary basis and whether, if the plaintiffs are paid on a salary basis, the regular rate has been correctly calculated for these plaintiffs.

The court thoroughly reviewed and considered the parties' arguments regarding the proper formula for calculating regular rate before issuing its memorandum and order of June 17, 1992. Therefore, the court will not revisit the issue of regular rate in its entirety. The court resolved that issue to the best of its ability and nothing the City now presents has persuaded the court to change its earlier holding.

The court, however, grants the City's request to clarify whether the annual compensation, which is to be divided by the total number of hours worked, less overtime hours, Kelly hours, and individual vacation time, per the court's order of June 17, 1992, includes the compensation paid for Kelly hours and vacation time. 29 U.S.C. §207(e)(2) states the regular rate shall not be deemed to include:

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; . . .

This rule is repeated and further explained at 29 C.F.R. §§778.218 and 778.219 (1992).

The court hereby clarifies its memorandum and order of June 17, 1992, and holds the annual compensation should be reduced by the payments made to plaintiffs for Kelly hours and individual vacation time. The sum of that calculation should be divided by the total number of hours worked, less overtime hours (162), Kelly hours (96), and variable vacation hours, in order to determine the regular rate.

Once the regular rate is properly calculated, the total compensation for each nonexempt employee must be determined. As provided for in each Memorandum of Agreement (MOA) entered into by plaintiffs and the City, plaintiffs should receive payment for Kelly hours, used sick leave, and used vacation hours. Overtime (any hours worked over 204 hours during a 27-day work period) is to be paid at one and one-half times the regular rate. See 29 C.F.R. §553.230(c) (1992). Naturally, the City is credited for any payments made to each plaintiff when determining the amount, if any, owed to that plaintiff.

The City further argues plaintiffs are not owed a recalculation of the regular rate due to the City's violation of the FLSA by including vacation hours because that claim was never filed by plaintiffs. The court has held the regular rate should not include vacation hours or the compensation paid for vacation hours. Apparently what

the City is requesting is that it be allowed to ignore what the court has already held to be the correct computation of regular rate merely because plaintiffs did not specifically state in their complaints that the inclusion of those hours was a violation of the FLSA. Plaintiffs' complaint is required to contain "a short and plain statement of the claim showing [they] are entitled to relief." Fed.R.Civ.P. 8(a). Each of the complaints filed by plaintiffs met this requirement and clearly stated the City had violated the FLSA by using an incorrect regular rate. Plaintiffs were not required to state with particularity the reasons the City's regular rate was incorrect. The court will not allow the City to use any calculation other than the one the court has already stated is correct.

Date for Recalculation of Regular Rate and Compensation

Next, the City asks the court to determine the date for recalculating the regular rate. The City contends either January 22, 1992, the date plaintiffs filed their fourth amended complaint, or June 17, 1992, or later, the date plaintiffs filed consents to the fourth amended complaint, should be used for recalculating the regular rate due to the City's violation of the FLSA by including overtime hours.

Section 16(b) of the FLSA states "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. §216(b). The City also points out the Portal-to-Portal Act further provides:

> In determining when an action is commenced for the purposes of section 255 of this title, an action commenced . . . under the Fair Labor Standards Act of 1938, as amended, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, . . . it shall be considered to be commenced in the case of any individual claimant –
>
> > (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
> >
> > (b) if such written consent was not so filed or if his name did not so appear – on the subsequent date on which such written consent is filed in the court in which the action was commenced.

29 U.S.C. §256.

The City contends these two statutes require plaintiffs to file written consents with or after the filing of any complaint or amended complaint upon which the plaintiffs are awarded relief. The original complaint claimed the City failed to compute overtime compensation by use of the correct regular rate and included the allegation that the City had improperly included Kelly day hours in its calculation of regular rate. (See Complaint, Dkt. No. 1 at ¶12.) It was not until the fourth amended complaint, in claim three, that plaintiffs assert the City violated the FLSA by including overtime hours, as well as Kelly hours, to determine the devisor of all hours worked. (See

Fourth Amended Complaint, Dkt. No. 37 at ¶36.) Thus, the City claims the date for recalculation to correct the inclusion of overtime hours is June 17, 1992, the date plaintiffs filed consents, or after June 17, 1992, for any plaintiffs who did not file a consent on June 17, 1992.

The original consents filed in this case state:

> The undersigned, ___, an employee or former employee, and similarly situated as plaintiffs herein, hereby consents to become a party plaintiff in captioned matter which asserts FLSA claims against the defendant.
>
> The undersigned agrees that as a consenting party to this action he/she will be bound by any order or judgment entered herein as if he/she was one of the named plaintiffs who are similarly situated.

(Ex. B, Memo. in Support of Def.'s Motion for Reconsideration; see Dkt. No. 3.)

On June 17, 1992, and at later dates, supplemental consents were filed by plaintiffs. These supplemental consents state:

> I do hereby renew, amend and supplement the consent I have previously executed in this case. I especially have and do consent to all of the issues, allegations, statements and denials of each complaint filed herein including the Fourth Amended Complaint. I do further renew the authority of my attorneys to amend and supplement the complaint on my behalf as they believe is justified by the facts and law without further consent.

(Ex. C, Memo. in Support of Def.'s Motion for Reconsideration; see Dkt. No. 59.)

The City appears to be making the argument that the earlier consents could not properly be used to show consent to the fourth amended complaint because the plaintiffs were not put on adequate notice of the claims brought by plaintiffs' attorneys. For support, the City cites *Walker v. Mountain States Tel. & Tel. Co.*, 112 F.R.D. 44 (D. Colo. 1986). In that case the court found the consents to a collective age discrimination action brought under the Age Discrimination in Employment Act of 1967 (ADEA)[1] was inadequate because the notice accompanying the consent forms were defective for several reasons. Among other defects, the notice did not explain the right of each potential class member to obtain independent legal representation. Ultimately, the court ordered new notice forms be sent to potential plaintiffs. 112 F.R.D. at 48.

The City also cites another ADEA case, *Sperling v. Hoffman- LaRoche, Inc.*, 118 F.R.D. 392 (D.N.J.), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989). There, the court stated the parties had not cited any authority regarding the meaning of "consent" within the context of a §216(b) opt-in procedure. The court, therefore, adopted from another

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[1] A class action under the ADEA is governed by §16(b) of the FLSA, 29 U.S.C. §216(b), rather than by Fed.R.Civ.P. 23. Rule 23 creates an "opt-out" mechanism while §216(b) creates an "opt-in" mechanism. *Sperling v. Hoffman-LaRoche, Inc.*, 118 F.R.D. 392, 399 (D.N.J.), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989).

context the definition of " 'full and effective disclosure of all the relevant facts . . . sufficient to enable [the consenting party] to make an informed decision. . . . ' " 118 F.R.D. at 408 (quoting *IBM v. Levin*, 579 F.2d 271, 282 (3d Cir. 1978)). When addressing an argument much like the City's, the court went on to state:

> Defendant's first objection is that the March 7 letter and consent form fail to indicate that a person opting-in must believe himself or herself to be a victim of age discrimination. As a subsidiary point, defendant complains that the letter and form fail to explain that plaintiffs might try their case at least in part under a disparate impact theory. These are silly objections. First, defendant cites no authority, and I know of none, which make a plaintiff's subjective belief in his victimization an element of an age discrimination claim. . . . Second, I find no harm caused by the failure of the letter and consent form to discuss disparate impact theory. Read together, the letter and form make clear that the named plaintiffs in the action would exercise their discretion to select counsel, and that anyone opting in would be bound by the results of counsel's efforts. . . . *Certainly, for defendant to demand that opt-ins receive up-front detail regarding alternative theories of liability under the ADEA verges on the ludicrous.*

118 F.R.D. at 408-09 (emphasis added).

In the case currently under consideration, the City has not presented any evidence proving the notice given plaintiffs who opted in was in any way defective. The original consent stated the individual was consenting to become a party plaintiff in this case "which asserts FLSA

claims" against the City. The fourth amended complaint claims the City violated the FLSA by including overtime hours and Kelly hours in its calculation of the regular rate of pay. Certainly, this is a FLSA claim as consented to by each individual who opted in by filing an original consent. There appears to be no reason for the plaintiffs to have filed supplemental consent forms. Because the original consents are sufficient to allow the plaintiffs to have standing to make the claim regarding the violation in the calculation of the regular rate, the filing date of the supplemental consents should not be used as the date for recalculating the regular rate.

Next, it must be determined whether the correct date for recalculating the regular date is the date of the filing of the fourth amended complaint. The City claims two years prior to the date of the filing of the fourth amended complaint, January 22, 1992, should be used. 29 U.S.C. §255(a) (2-year limitation unless violation is willful, then 3-year limitation). Plaintiffs argue the correct date is two years prior to the filing of the original complaint, November 14, 1990.

Count one of the original complaint alleged the City failed to compute overtime compensation by use of the correct regular rate. Specifically, plaintiffs claimed the inclusion of Kelly hours caused them to be under-compensated for overtime hours. (Dkt. No. 1, Complaint at ¶12.) This allegation of the use of an incorrect regular rate and under-compensation for overtime is included in the first, second and third amended complaints. (See Dkt. No. 19, Amended Complaint, Count One; Dkt. No. 26, Second Amended Complaint, Claim Four; Dkt. No. 33, Third Amended Complaint, Claim Three.) It was not until

the fourth amended complaint that plaintiffs revised this claim to allege a failure to compute the correct regular rate, specifically mentioning Kelly hours *and overtime hours*, and failure to pay *straight time* and overtime pursuant to law. (See Fourth Amended Complaint, Dkt. No. 37, Claim Two.)

Plaintiffs claimed the regular rate was miscalculated in the original complaint and every amended complaint. Up until the fourth amended complaint, however, plaintiffs had not sought compensation for any under-payment of straight time along with overtime hours. The determination of the applicable date is governed by Rule 15, which states in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when
>
> . . . .
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

Fed.R.Civ.P. 15(c). The purpose of Rule 15(c)(2) is accomplished if the original complaint "gives the defendant fair notice that litigation is arising out of a specific factual situation." *Longbottom v. Swaby*, 397 F.2d 45, 48 (5th Cir. 1968).

In *Brennan v. Tar Heel Home Supply, Inc.*, 62 F.R.D. 190 (D.N.C. 1974), plaintiffs moved to amend their complaint that alleged the defendants had violated §§15(a)(2) and 15(a)(5) of the FLSA. Plaintiffs wished to amend their complaint to include the allegation that defendants had acted willfully, and thereby invoke the three-year statute

of limitations found in 29 U.S.C. §255. The court stated the relation-back provision did not apply to amendments that add new causes of action. The court found, "[t]he amendment would merely classify the defendants' conduct as 'willful' but in no way would affect the proof of whether the defendants in fact violated the act. The conduct, transactions, and occurrences surrounding the alleged actions in the complaint and in the proposed amended complaint would be the same." 62 F.R.D. at 193. Therefore, the court granted the plaintiffs' motion to amend and held it would relate back to the date of the original complaint.

In the case currently under consideration, plaintiffs asserted the City violated the FLSA by not using the correct regular rate in the original complaint and included that assertion in every amended complaint including the fourth amended complaint at claim three. The City had ample notice of the regular rate claim. Although some changes were made between the original complaint at count one and the fourth amended complaint at claim three, the court finds it is essentially the same claim arising out of the same conduct. Thus, the applicable statute of limitation sets the date for recalculation at November 14, 1988, two years prior to the filing of the original complaint. The date for recalculation for any plaintiff who did not file a consent with the original complaint is the day his or her opt-in consent was filed with the court.

In its June 17, 1992 memorandum and order, this court found the plaintiffs' claim for unpaid hours did not relate back to the date the suit was originally filed because plaintiffs did not assert that claim until August

19, 1992, when they filed their second amended complaint. *Aaron*, slip op. at 8. The court believes its holding here is in harmony with its earlier decision regarding unpaid hours. Plaintiffs' claim for unpaid hours had not been raised in the original complaint, although admittedly it was another claim under the FLSA. In any case, the court's earlier decision regarding the statute of limitations of plaintiffs' claim for unpaid hours was rendered moot when the court further found plaintiffs had been compensated for every hour worked. *Aaron*, slip op. at 10.

Have Exempt Employees Been Salaried Since January 1991?

Finally, the City asks the court to clarify the June 17, 1992, memorandum and order regarding its holding that captains, battalion chiefs, and division chiefs are nonexempt employees because these employees are not paid on a salary basis. The memorandum and order outlined two tests for determining whether an employee qualifies for the executive exemption: the "short" test and the "long" test. 29 C.F.R. §541.1; see *Aaron*, slip op. at 16-17. The employer has the burden of proving the executive exemption applies and that the employee fits "plainly and unmistakenly within the exemption terms." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). The "short" test requires an employee: (1) be compensated on a salary basis at a rate of at least $250 per week; (2) whose primary duty is management; and (3) who regularly directs the work of two or more other employees. 29 C.F.R. §541.1(f) (1992).

The City argues that in January 1991 the City changed its policy regarding the charging of sick leave and vacation for captains, battalion chiefs and division chiefs. From that time forward, the City only charged sick leave and vacation for exempt employees in increments of a day or more. Furthermore, since March 15, 1991, these employees have been paid a bi-weekly salary which represents payment of their straight time. Therefore, the City claims these employees have been exempt, salaried employees since at least March 1991 and asks the court to clarify its order to state these employees' compensation should only be recalculated for time worked before March 1991. For support the City cites statements made by plaintiffs that acknowledge these employees have been paid a bi-weekly salary since March 15, 1991, and their absences from work are only charged in increments of a day or more. (Def.'s Memo. in Support of Motion for Reconsideration at 30.)

In response, plaintiffs allege the new policy for absences is more restrictive than the old policy because the employee is required to request the time off in writing, which must then be approved by his superiors. Plaintiffs claim that until recently these absences were limited to 12 hours per year, but are now set at 40 hours per year. In addition, vacation leave, sick leave, and retirement are still earned on an hourly basis. The City continues to pay these employees for overtime when on constant staffing on an hourly basis. (See Pltfs.' Response, Ex. 87 – Second Aaron Aff.)

It should be noted that in September 1991 the Department of Labor (DOL) acknowledged special problems involving the qualification of public employees as exempt

from the FLSA under 29 C.F.R. §541.118 and adopted a new regulation, 29 C.R.F. [sic] §541.5d. According to §541.5d, a public employee who otherwise meets the requirements of §541.118 shall not be disqualified if the employee's pay is reduced because of personal leave and sick leave absences of less than one work day if that policy is based upon a pay system established by ordinance, regulation, or public policy. 29 C.F.R. §541.5d(a) (1992).

According to exhibit 3 of Aaron's second affidavit, in May 1992, he was paid for 24 hours of overtime but this was not at time and a half. Aaron's pay stubs list the hours for such things as regular rate, Kelly day, and sick pay. Next to these, in another column, is the compensation paid for each category. If Aaron took sick leave or a Kelly day during a pay period, the total of his regular pay, pay for sick leave and pay for a Kelly day equal his normal salary for that pay period (i.e., pay is not reduced due to absences).

Aaron's pay stubs clearly show he, as a captain, is paid for extra hours he works during a pay period. As the court noted in its June 17, 1992 memorandum and order, receiving additional compensation for extra hours worked is not generally consistent with salaried status. *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785, *reh'g denied*, 111 S.Ct. 1341 (1991). Section 541.118(b) does allow for some extra pay for exempt, salaried employees. The examples given in §541.118(b), however, refer to commissions and percentages of sales.

Salaried employees receive a predetermined amount which does not bear a direct causal relationship to the

quality or quantity of work performed. The increase in these employees' salaries due to overtime hours indicates they are not salaried employees within the meaning of 29 C.F.R. §541.118(a). Even with the changes in the City's policies, captains, battalion chiefs, and division chiefs are not exempt employees. Thus, the City is ordered to recalculate these plaintiffs' compensation in accordance with the overtime requirements of the FLSA from the applicable date, discussed elsewhere, to the present.

For all the above reasons, the City's motion for reconsideration, modification, and clarification is granted in part and denied in part.

Court Ordered Rehearing

In its June 17, 1992 memorandum and order, the court stated the issue of willfulness and party intent is not readily solved by summary judgment and found there was a factual dispute on this issue. Therefore, the court found it could not decide the issues of willful violation, extension of the statute of limitations, and liquidated damages as to the nonexempt employees as a matter of law at that time. The court, however, ordered a rehearing on these issues in order to more fully contemplate the facts and arguments. Both parties filed briefs in response to the court's order. In addition, plaintiffs filed a brief in support of their earlier motion for partial summary judgment on count three of the fourth amended complaint on the same issues and the City responded.

The City argues it is entitled to summary judgment on these issues. The City utilized a review committee to

review compliance with the FLSA generally. This committee was concerned with the correct method of calculating the regular rate. The City contacted outside legal counsel, the law firm of Liebert, Cassidy & Frierson. That firm had published a workbook entitled "Implementing the Fair Labor Standards Act – A Guide for Local Public Agencies," which Liebert, Cassidy & Frierson provided to the City. This workbook was relied upon by the City in making decisions regarding the compensation of employees of the fire department.

Janell Jenkins, an assistant city attorney, wrote to the DOL asking how the City could legally compute the regular rate. Ronald N. Dean, assistant regional administrator for Wage-Hour/ESA of the DOL, responded to Ms. Jenkins' letter and his letter was relied upon by the committee. From 1986 to the present, the City has received numerous publications concerning FLSA issues, including information from the League of Kansas Municipalities. The City claims it has continually recognized its overtime obligations under the FLSA.

Plaintiffs contend the City's letter opinion from Ronald N. Dean, of the DOL, does not serve as a defense because the City did not follow the advice contained in that letter. Specifically, the letter states "the regular rate may not be based on an artificial number of hours of work." The City, however, in its memorandum in support of reconsideration at 24, stated:

> On reviewing actual employee records, defendant determined that fire employees never worked 162 hours of regularly scheduled overtime in a year. The hours of overtime are reduced by Kelly days, vacation and sick leave.

> In fact, for the years 1989, 1990, and 1991, 24-hour non-exempt employees averaged only 57.4 hours of regularly scheduled overtime hours in a year. Bode Affidavit, ¶4.

Plaintiffs claim this paragraph proves the City knew and purposefully used an artificial number of hours of work when calculating compensation.

Other than this, however, plaintiffs present no evidence that the City willfully violated the FLSA. Plaintiffs do not present any statement by a city official or committee member that indicates the City intentionally disregarded Dean's letter or other advice it received pertaining to the proper calculation of a regular rate. The plaintiffs do point out Fire Chief Jim E. Sparr, a member of the City's review committee, on several occasions expressed his opinion that the City's compensation plan was illegal. Various officials held a number of meetings to discuss Sparr's position.

Liquidated Damages

Any employer who violates §207 is liable to the employees in an additional equal amount as liquidated damages. 29 U.S.C. §216(b). A defense is found in 29 U.S.C. §260 which provides an employer may avoid liquidated damages if the employer proves the violation of the FLSA was made (1) in good faith and (2) with reasonable grounds for believing his act or omission was not a violation of the FLSA. In such a case, "the court may, in its sound discretion, award no liquidated damages or award any amount," not to exceed the amount provided for in 29 U.S.C. §216. The burden of proof is on the

employer. *Renfro v. City of Emporia, Kansas,* 948 F.2d 1529, 1541 (10th Cir. 1991). To carry its burden, the employer must show it took affirmative steps to ascertain the FLSA's requirements, but nonetheless violated its provisions. *Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 908 (3d Cir. 1991), *cert. denied,* 112 S.Ct. 1473 (1992).

Plaintiffs cite *Doty v. Elias,* 733 F.2d 720, 726 (10th Cir. 1984), in which the court states:

> An employer's ignorance of the requirements of the Act does not constitute reasonable grounds for believing that his actions complied with the Act. Elias admitted that he never sought an opinion from an attorney or the relevant government agency regarding the legality of his method of compensating his employees. Elias testified that he periodically received government literature regarding the wage and hour laws but did not read it.

(Citations omitted.)

Certainly the facts of *Doty v. Elias* are much different from those found in the case currently under consideration. The City formed a committee to review the proper way to calculate the regular rate, it contacted outside legal counsel and was supplied with that law firm's workbook regarding the FLSA, and it wrote to the DOL for advice. Plaintiffs attempt to rebut the City's evidence by showing Fire Chief Sparr disagreed with the City's compensation plan and alleging the City did not follow Dean's advice. Plaintiffs' interpretation of Dean's letter is inaccurate, especially in regard to the statement that "the regular rate may not be based on an artificial number of

hours." This statement was made in reference to a 19-day work period with 144 scheduled hours.

Plaintiffs also cite *Spires v. Ben Hill County*, 980 F.2d 683, 690 (11th Cir. 1993), in which the court noted the DOL has determined, in an administrative ruling, that an opinion letter signed by any Hour and Wage staff member below the level of the administrator may not be relied on for purposes of a good faith defense under 29 U.S.C. §260. This statement is borrowed from the district court's decision in *Spires*. In that opinion the court quotes the DOL October 9, 1987, letter ruling which states it applies to the good faith defense of the Portal-to-Portal Act, §10. *Spires v. Ben Hill County*, 745 F.Supp. 690, 709 (M.D. Ga. 1990), *aff'd*, 980 F.2d 683 (1993). Section 10 of the Portal-to-Portal Act is codified at 29 U.S.C. §259, which provides a complete defense from any liability or punishment if the employer relied in good faith "on any written administrative regulation, order, ruling, approval, or interpretation" prepared by the administrator of the Wage and Hour Division of the DOL. The DOL's letter ruling even refers to subsection (b)(1) of §10 of the Portal-to-Portal Act that states the opinion letter should be signed by the administrator. Section 260 which pertains to the good faith and reasonable grounds defense for liquidated damages does not contain any subsections. Section 11 of the Portal-to-Portal Act is codified at 29 U.S.C. §260. Therefore, this court refuses to follow the rule stated by the Eleventh Circuit in *Spires*. Assuming what plaintiffs argue is true, if the City cannot properly rely on the opinion letter to show good faith, then plaintiffs cannot use the letter to prove the City did not act in good faith.

The FLSA is very complex. A difference of opinion as to its application does not prove the City did not act in good faith and on reasonable grounds. The City has presented evidence that it was attempting to comply with FLSA requirements and based its compensation plan on information and materials from reliable sources. Plaintiffs have failed to prove there is a genuine issue as to any material fact. Therefore, the court finds as a matter of law the City acted in good faith and on reasonable grounds. Plaintiffs' motion for summary judgment is denied.

Willfulness and the Statute of Limitations

The applicable statute of limitations for a violation of the FLSA is two years, unless "a cause of action [arises] out of a willful violation," in which case the statute of limitations is extended to three years. 29 U.S.C. §255(a). The United States Supreme Court has defined willful in the context of the FLSA to mean conduct that is not merely negligent, but instead, indicates "the employer either knew or showed reckless disregard" for the Act. *McLaughlin v. Richland Show Co.*, 486 U.S. 128, 133 (1988).

The City contends the statute of limitations should not be expanded to three years because it did not act willfully. The City relied on the opinion letter prepared by an assistant regional administrator of the Wage and Hour Division of the DOL and formed a committee to review FLSA requirements. The court has already found the City acted in good faith. Thus, the court also finds as a matter of law the City's violation of the FLSA was not willful and the applicable statute of limitations is two years. The date for recalculating the regular rate and

compensation remains at November 14, 1988, or the date an individual plaintiff filed his or her opt-in consent if after November 14, 1988. Accordingly, plaintiffs' motion for summary judgment is denied.

Plaintiffs' Motion for Partial Summary Judgment

Liquidated Damages for Exempt Employees

Plaintiffs move for summary judgment on the issue of whether captains, battalion chiefs, and division chiefs should be awarded liquidated damages. Again, to avoid such an award, the City must show its violation was made in good faith and on reasonable grounds. The parties' arguments are essentially the same as those discussed above. Plaintiffs, however, make the additional claim that the City's efforts and those of the review committee were directed toward the nonexempt employees and overlooked the requirements governing exempt employees.

The court is not persuaded. The facts are thoroughly discussed above and the court finds as a matter of law the City acted in good faith and on reasonable grounds when it designed its compensation plan for captains, battalion chiefs, and division chiefs. Thus, plaintiffs' motion for summary judgment is denied.

Willfulness in Regard to Exempt Employees

Plaintiffs argue the applicable statute of limitations should be three years for the claims made by captains, battalion chiefs, and division chiefs. Plaintiffs claim the

City did not rely on advice of counsel as to them or seek a ruling or opinion from the DOL as to them.

The City continues to argue the court's determination that these plaintiffs were not paid on a salary basis is wrong. The City also restates all the policy changes it made in early 1991 regarding exempt employees – apparently to suggest it acted in good faith. The City further points out that conflicting case law on the issue of exempt employees' compensation prompted the DOL to adopt 29 C.F.R. §541.5d, which provides special provisions adopt 29 C.F.R. §541.5d, which provides special provisions applicable to public sector employers. See 56 Fed. Reg. 45824.

In accordance with the court's finding that the City acted in good faith and on reasonable grounds, the court further finds as a matter of law the City did not act willfully. Therefore, the court denies plaintiffs' motion for summary judgment. The applicable statute of limitation for captains, battalion chiefs, and division chiefs is two years.

IT IS THEREFORE ORDERED this 9th day of March, 1993, that, on rehearing, plaintiffs' motion for partial summary judgment (Dkt. No. 40) on issues of willfulness, applicable statute of limitation, and liquidated damages is denied.

IT IS FURTHER ORDERED that defendant's motion for reconsideration, modification, and clarification (Dkt. No. 72) is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (Dkt. No. 81) is denied.

IT IS FURTHER ORDERED that the City of Wichita shall make a complete and accurate accounting within 60 days, in consultation with plaintiffs' counsel, of all straight time and overtime compensation due each plaintiff, in accordance with the clarifications stated herein. In due course the court will schedule a status conference with all counsel.

/s/ Patrick F. Kelly
PATRICK F. KELLY,
CHIEF JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD L. AARON, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. THE CITY OF WICHITA, KANSAS, Defendant.	)	No. 90-1536-PFK

MEMORANDUM AND ORDER

(Filed April 16, 1993)

The City of Wichita (City) and plaintiffs have submitted their contentions on how plaintiffs' compensation should be calculated in order to comply with this court's memorandum and orders of June 17, 1992 and March 9, 1993. The court heard the parties' arguments on April 2, 1993. The court has considered those arguments as well as the parties' letters and filed memorandums. The parties agree on the calculation for the regular rate but disagree on the use of the regular rate to determine total compensation. The parties have used the hours and compensation of plaintiff Ronald Aaron for the year 1991 as an example.

Using the City's calculations as a starting point, the City claims Aaron's compensation should only be recalculated for the pay periods in which he worked overtime.

According to the City, in those pay periods he should be paid the regular rate for straight time hours, one and one-half times the regular rate for overtime hours, and vacation time and Kelly day hours at $10.4989 per hour. Plaintiffs have submitted several theories on how compensation should be figured.

In its letter to the court and at the hearing, the City raised the following three issues:

> I. Whether plaintiffs must be paid at the regular rate for every hour worked (other than overtime) throughout the year, or should the regular rate be used only in the pay periods in which overtime was worked.
>
> II. Whether the City must pay nonworking hours, such as vacation time, Kelly hours, sick leave, and well days, at the "contract rate" ($10.4989 per hour), or must the City pay the regular rate for these hours.
>
> III. Whether the contract annual salary ($30,546.25 for Aaron in 1991) is for nonovertime hours *worked* only.

Issue I

The City claims straight time is only paid at the regular rate in pay periods when the employee has worked overtime, because this is a Fair Labor Standards Act (FLSA) case. The main purposes of the FLSA are to specify a federal minimum wage, require overtime pay at one and one-half times the regular rate, and restrict child labor. See 29 U.S.C. §201 *et seq.* Therefore, the City contends the only time regular rate becomes an issue and,

inter alia, is paid is in pay periods in which overtime is worked.

This court has stated:

> The regular rate is the hourly rate actually paid to the employee for the normal, nonovertime work week for which he is employed. *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204, *modified*, 331 U.S. 795 (1947). . . . The regular rate is a rate per hour, although the FLSA does not require employers to compensate employees on an hourly basis. 29 C.F.R. §778.109. If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his regular rate. 29 C.F.R. §778.110. If the employee is employed on a salary basis, however, his regular hourly rate of pay is computed by dividing the salary by the number of hours for which the salary is intended to compensate. 29 C.F.R. §778.113."

(Dkt. 58, June 17, 1992 Memo. and Order at 11-12.)

Thus, the regular rate is the proper hourly rate for all nonovertime hours worked every pay period. In its June 17, 1992 memorandum and order, this court stated: "Under the City's method of calculation, plaintiffs' regular rate is understated. . . . " (Dkt. 58, June 17, 1992 Memo. and Order at 13.) In their fourth amended complaint, claim two, plaintiffs allege the City has failed to pay straight time pursuant to law. This is precisely what plaintiffs are referring to – the City has understated the regular rate which is the same as the hourly rate for straight time.

The City must pay the regular rate for every hour worked that is not overtime. Overtime, any hours worked over 204 hours per pay period, must be paid at one and one-half times the regular rate.

Issue II

The City contends $10.4989 is the hourly rate to be paid for all nonworking hours, rather than the regular rate. The City claims plaintiffs agreed to work for $10.4989 per hour and because that rate is above minimum wage this issue is a matter of contract and cannot be a violation of the FLSA.

Plaintiffs agreed to work for certain salaries per year and did not agree to work for the understated hourly rates listed in the City's 1991 salary schedule. The City arrived at the hourly rates by dividing the annual salary by 2,912, which the court has held was an overstated divisor because it improperly included overtime hours. It is impossible for the court to determine whether an FLSA violation has occurred without interpreting the compensation portion of the parties' employment agreement. The court has done this and found plaintiffs did not agree to work overtime for the annual salary in the MOAs or, in years in which no MOA exists, the annual salary listed in the City's salary schedule. Thus, in effect, the court has held that in 1991 Aaron agreed to work all his nonovertime hours for $30,546.25. Because the regular rate represents an hourly wage that plaintiffs are to be paid for straight time, the regular rate is also what they should be paid for Kelly hours, vacation time, and other nonworking hours.

Issue III

Plaintiffs claim the contract salary is for nonovertime hours worked only, and therefore, vacation, Kelly day hours, sick leave, and well days should be paid in addition to the contract salary. Thus, for example, an employee should be paid his salary for the pay period *and* an hourly amount for any sick leave, vacation time, etc. he may have taken. This argument is without merit. This method of compensation would allow double payment for nonworking hours and have the effect of rewarding an employee for being sick and taking vacation. The court finds compensation for nonworking hours was intended to be included in the annual salary.

Regular Rate Formula

This court has held "the annual compensation should be reduced by the payments made to plaintiffs for Kelly hours and individual vacation time. The sum of that calculation should be divided by the total number of hours worked [56 hrs/wk x 52 wks = 2,912], less overtime hours (162), Kelly hours (96), and variable vacation hours, in order to determine the regular rate." (Dkt. 94, March 9, 1993 Memo. and Order at 6.)

The parties have determined the regular rate as follows:

$$\frac{\text{Annual - (Kelly Pay + Vacation Pay)}}{\text{Hours - (OT Hours + Kelly Hours + Variable Vacation Hours)}}$$

(2,912) (162) (96) (229.5)

Grade 724, F Step Fire Lieutenant $30,546.25 Agreed Annual Salary

229.5	Hours of Vacation Taken
+96.0	Hours of Kelly days
325.5	
x10.4898	Hourly rate ($30,546.25 divided by 2,912 hours)
$3,414.43	Paid for Vacation and Kelly Days

Ronald Aaron for 1991:

$$\frac{\$30,546.25 - \$3,414.43}{2,912 - (162 + 96 + 229.5)}$$

$$\frac{\$27,131.82}{2,424.5} = \$11.1907 \text{ Regular Rate}$$

The court agrees with the parties' basic regular rate formula except for the amount paid for Kelly hours and vacation pay. The $10.4898 per hour used by the parties is arrived at by dividing the annual salary ($30,546.25) by the total hours (2,912). The court has held that hourly rate ($10.4898) is understated because the divisor (2,912) improperly includes overtime hours. In Issue I above, the court found Kelly hours and vacation pay should be paid at the regular rate.

As discussed above, the City argues that plaintiffs can agree to work for any amount over minimum wage and that plaintiffs agreed to work for $10.4898 per hour. It is true that plaintiffs can agree to work for any amount over minimum wage. In 1991, however, Aaron agreed to work for $30,546.25 per year. The $10.4898 per hour figure is incorrect due to the use of 2,912 as the divisor ($30,546.25 divided by 2,912 = $10.4898). Therefore, the court finds the regular rate formula should allow for

payment of Kelly day hours and vacation time at the regular rate. Put another way, the annual compensation should be reduced by what plaintiffs *should* have been paid for vacation time and Kelly day hours rather than by what plaintiffs *were* paid for those hours. The regular rate should be calculated as follows:

$$\frac{\text{Annual} - ((\text{Kelly Hrs} + \text{Vacation Hrs}) \times \text{Regular Rate})}{\text{Hours} - (\text{OT Hours} + \text{Kelly Hours} + \text{Variable Vacation Hours})}$$

$$\frac{\$30{,}546.25 - ((96 + 229.5) \times \text{Regular Rate})}{2{,}912 - (162 + 96 + 229.5)}$$

$$\frac{\$30{,}546.25 - (325.5 \times \text{Regular Rate})}{2{,}912 - 487.5} = \text{Regular Rate}$$

$$\frac{\$30{,}546.25 - (325.5 \times \text{Regular Rate})}{2{,}424.5} = \text{Regular Rate}$$

$$\$30{,}546.25 - (325.5 \times \text{Regular Rate}) = 2{,}424.5 \times \text{Regular Rate}$$

$$\$30{,}546.25 = 2750 \times \text{Regular Rate}$$

$$\frac{\$30{,}546.25}{2750} = \frac{2750 \times \text{Regular Rate}}{2750}$$

$$\$\ 11.1077273 = \text{Regular Rate}$$

$$\$\ 11.11 = \text{Rounded Regular Rate}$$

This formula has the same result as if the divisor of 2,912 is only reduced by the hours of overtime (2,912 - 162 = 2,750; $30,546.25 divided by 2,750 = $11.11, the regular rate). When the City asked the court to reconsider its formula for regular rate and reduce the annual salary by the amount paid for Kelly day hours and vacation time, plaintiffs argued that taking the hours and the pay out of the formula would have the same effect as leaving the hours and the pay in the formula. The above calculation proves that point. In its memorandum and order of

March 9, 1993, the court ordered both hours and pay deducted because the statutes and regulations require the regular rate to exclude "payments made for occasional periods when no work is performed due to vacation, holiday, illness, . . . " 29 U.S.C. §207(e).

Using the correct regular rate and following the courts findings, Aaron's 1991 compensation is as follows:

Nonovertime hours:	2909.5	x	$11.11			$32,324.545
Overtime hours:	43.5	x	$11.11	x	1.5 =	724.9275
Total hours	2953					$33,049.4725
Less Amount Paid						-30,438.04
Amount Owed						$ 2,611.43

Nonovertime hours include 2483 hours worked, 96 hours of sick leave, 5 hours of well time, 96 hours of Kelly time, and 229.5 hours of vacation time.

IT IS THEREFORE ORDERED this 15 day of April, 1993, that the City of Wichita shall make a complete and accurate accounting within 60 days, in consultation with plaintiffs' counsel, of all straight time, nonworking hours, and overtime compensation due each plaintiff, in accordance with the clarifications stated herein.

/s/ Patrick F. Kelly
PATRICK F. KELLY,
CHIEF JUDGE

APPENDIX E

Ronald L. AARON, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs,

v.

The CITY OF WICHITA, KANSAS, Defendant.

No. 90-1536-PFK.

United States District Court,
D. Kansas,

May 3, 1993.

Fire fighters moved for prejudgment interest on compensatory damages awarded in their Fair Labor Standards Act (FLSA) action against city. The District Court, Patrick F. Kelly, Chief Judge, held that fire fighters were entitled to award of prejudgment interest.

Motion granted.

Charles W. Harris of Curfman, Harris, Rose, Weltz & Smith, and Ronald D. Innes, Wichita, KS, for plaintiffs.

Robert L. Howard, Richard D. Ewy, and Gloria Flentje of Foulston & Siefkin, Wichita, KS, for defendant.

MEMORANDUM AND ORDER

PATRICK F. KELLY, Chief Judge.

Plaintiffs, current and former fire fighters of the Operations/Fire Suppression Division of the Wichita Fire Department, have moved for prejudgment interest on all underpayments of straight time and overtime wages

owed them by the City of Wichita (City). (Dkt. No. 100.) The City has responded to plaintiffs' motion and plaintiffs have filed their reply. Upon reviewing the parties' briefs, the court finds no hearing on this matter is necessary.

Plaintiffs brought this suit against the City alleging violations of the Fair Labor Standards Act (FLSA). On June 17, 1992, this court entered a memorandum and order in which the court held the City had violated § 7 the FLSA, as amended and codified at 29 U.S.C. § 207. (Dkt. No. 58.) On March 9, 1993, the court further held the City's violations were not willful, and therefore the City was not required to pay liquidated damages pursuant to 29 U.S.C. § 216(b). (Dkt. No. 94, March 9, 1993 Memo. and Order at 22.) Most recently the City was ordered to determine all straight time, nonworking hours, and overtime compensation due each plaintiff. (Dkt. No. 103, April 16, 1993 Memo. and Order at 8.)

Plaintiffs argue that in the absence of a liquidated damages award, they are entitled to prejudgment interest. See *Blim v. Western Elec. Co., Inc.*, 731 F.2d 1473, 1479 (10th Cir.), *cert. denied*, 469 U.S. 874, 105 S.Ct. 233, 83 L.Ed.2d 161 (1984) (Age Discrimination in Employment Act (ADEA) case applying FLSA provisions; court held prejudgment interest cannot be awarded if plaintiffs receive liquidated damages). Plaintiffs claim such an award is necessary to fully compensate them for their losses. For support, plaintiffs cite *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 57 (2d Cir.1984), which states "[t]he overwhelming weight of authority is that pre-judgment interest should generally be included in a back pay award . . . even if the underpayments were made in good faith. . . ."

The *Donovan* court went on to explain that "[p]re-judgment interest obviously serves the compensatory purpose by making up for the delay in receiving the money, during which time the employees were denied its use, and by partially offsetting the reduction in the value of the delayed wages caused by inflation." 726 F.2d at 58.

Several courts have discussed the various functions of prejudgment interest awards. For example, such an award serves to make whole an employee who has been deprived of his wages unlawfully and also discourages unlawful employment practices by the employer. *Ford v. Alfaro,* 785 F.2d 835, 842 (9th Cir.1986). In *Brock v. Richardson,* 812 F.2d 121, 127 (3d Cir.1987), the court found awarding prejudgment interest served to remedy the business advantage the employer gained by violating the FLSA. Put another way, the award prevents the employer from being unjustly enriched.

The City acknowledges the reasons for awarding prejudgment interest and further states that such awards should be ordered or denied after considering principles of fairness and equity. *Brock,* 812 F.2d at 126. The City, however, argues the purposes served by awarding prejudgment interest will not be served in this case if the court grants plaintiffs' motion. The City points out it is not a profit-making institution and thus, the unpaid wages did not generate a windfall for the City. Moreover, the City did not gain an unfair competitive advantage because it is not in competition with any other fire departments. Finally, the City contends it should not have to pay prejudgment interest because, had the City paid the wages the court has since determined were due, the

individual fire fighters would have spent those small additional payments rather than invested those monies.

The court agrees that because the employer in this case is a governmental entity and not a profit-making business, some of the purposes served by awarding prejudgment interest will not be served here. The court, however, does not believe that fairness and equity weigh in the City's favor. The fact that the City has a local monopoly on employing fire fighters should not outweigh the fact that the back pay the plaintiffs will receive now is not worth as much as when it was earned. The City's arguments belittle the importance of even small amounts of money to the wage earning plaintiffs. This court is especially persuaded by the reasoning articulated in *Heiar v. Crawford County, Wis.*, 746 F.2d 1190 (7th Cir.1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985) (case involved violations of the ADEA). There, the court stated:

> The usual assumption in economics as in life is that a dollar today is worth more than a dollar tomorrow, both because it can be invested and earn interest and because the future is uncertain. On that assumption the plaintiffs have lost something by having to wait years to receive the salary payments that it now turns out the defendants owed them, even if they did not borrow during the interim.

746 F.2d at 1203.

It is within the court's discretion to award prejudgment interest. *Donovan*, 726 F.2d at 58. For the above reasons, plaintiffs' motion for prejudgment interest is granted. The parties agree that the interest should be

based on the federal judgment interest rate as provided by 28 U.S.C. § 1961. See *Ford,* 785 F.2d at 842 (prejudgment interest should ordinarily be awarded at postjudgment rate).

IT IS THEREFORE ORDERED this 3 day of May, 1993, that the plaintiffs' motion for prejudgment interest (Dkt. No. 100) is granted.

IT IS FURTHER ORDERED that the City of Wichita shall adjust its complete and accurate accounting of all straight time, non-working hours, and overtime compensation due each plaintiff to include prejudgment interest at the rate provided by 28 U.S.C. § 1961. Prejudgment interest shall be calculated on all amounts due plaintiffs from the date of accrual of each underpayment.

APPENDIX F

FOULSTON & SIEFKIN
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RONALD L. AARON, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. THE CITY OF WICHITA, KANSAS, Defendant.	Civil Action No. 90-1536-PFK

JUDGMENT

(Filed Aug. 5, 1993)

NOW on this 5 day of August, 1993, the above-captioned matter comes on for entry of a final judgment. The plaintiffs appear by and through their counsel of record, Charles W. Harris of Curfman, Harris, Rose, Weltz and Smith and Ronald D. Innes. The defendant appears by and through their counsel of record, Robert L. Howard, Richard D. Ewy and Gloria G. Flentje of Foulston & Siefkn.

THEREUPON, the Court, being duly advised in the premises, incorporates herein as if set out in full its (a)

Memorandum and Order filed June 17, 1992, (b) *Memorandum and Order* filed March 9, 1993, (c) *Memorandum and Order* filed April 16, 1993 and (d) *Memorandum and Order* filed May 3, 1993, as its legal basis for entry of a final judgment. *Plaintiffs' Motion For Reconsideration And For Further Relief* is denied as being untimely filed.

THE COURT FINDS that, pursuant to the memoranda and orders entered herein, the defendant has calculated the underpayments of wages through July 16, 1993, and prejudgment interest through July 23, 1993, due each of the plaintiffs and that each of the plaintiffs should have judgment against the defendant in the amounts set forth in the last column of Exhibit "A" consisting of the twelve pages attached hereto.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that judgment should be, and hereby is, entered in favor of each of the individual plaintiffs and against the defendant in the amounts specifically set forth in the last column of Exhibit "A" attached hereto, said judgment to be entered and effective as of the 23rd day of July, 1993.

IT IS BY THE COURT SO ORDERED.

/s/ PATRICK F. KELLY
CHIEF JUDGE
The Honorable
Patrick F. Kelly

APPROVED:

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Attorneys for Defendant

[Exhibit Omitted In Printing]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD L. AARON, DOUGLAS K. ACUNA, BERTON ADAMSON, BRIAN E. ADDIS, MARK J. ALEXANDER, DONALD E. ALLEN, TROY W. ALLEN, GARY W. ANDERSON, KIM L. ANDERSON, THOMAS J. ANDERSON, DANIEL J. ARMSTRONG, EDWARD L. ARNOLD, KENNETH D. AST, ROBERT W. AVERY, MARK D. BAKER, SAM W. BANNISTER, III, ROBERT M. BARRETT, JAMES J. BARRIENTOS, ROBERT G. BATTAGLEAR, WILLIAM C. BEAN, F. HOWARD BECKER, JACK N. BENNETT, ALAN L. BENSON, FLOYD R. BESS, STUART BEVIS, CHARLES F. BICKEL, JOSEPH F. BICKEL, GREGORY L. BLACK, GARY L. BLANKINSHIP, TIMOTHY N. BOHANNAN, WEBSTER T. BOURN, CHRIS M. BOWEN, ROBERT L. BRADFIELD, ROBERT S. BROWN, RONALD J. BROWN, DARRIN L. BRUHN, FRANK E. BUCK, RICHARD A. BUSHEY, DAVID A. CAIN, EVERETT J. CARPENTER, ROBERT R. CARR, TIMOTHY M. CARR, RICKEY S. CARTER, GEORGE T. CHANDLER, RONALD L. CHARLES, BRYAN CHAVEZ, DWAYNE F. CHEW, BYRON N. CHRISLER, PAUL D. CHRISTMAN, WILLIAM E. CLARKIN, MICHAEL R. CLEVENGER, LARRY D. CLYNE,	)	Nos. 93-3245 93-3262 (D.C. No. 90-1536-PFK)

GALE D. COCANNOUER, ANDREW M. COLE, LARRY C. COLE, GREGORY D. CONNER, JAMES D. CONNER, WILLIAM R. CORDTS, MICHAEL D. CORNS, JOSEPH F. COUEY, DENNIS R. COWEL, JOHN W. CRANDELL, KENNETH A. CRAWFORD, RONALD D. CRISLER, MARK CURLESS, GARY E. CURMODE, MICHAEL D. CUSTER, ROBERT W. DAVIDSON, RAY J. DAVIS, STEPHEN R. DAVIS, BRIAN L. DODY, SCOTT A. DOWNS, MEREDITH B. DOWTY, JERRY L. DUFF, DAVID L. DUNAGAN, HARLEY D. DYER, BILLY W. DYSART, DARREN T. DYSART, MICHAEL L. ELLSWORTH, MATTHEW W. ELSEA, KENNETH A. ENYEART, RONALD B. EVANS, R. MICHAEL FENTON, LARRY D. FEUERBORN, JAMES L. FIANT, GARY M. FISHER, TROY FRANKLIN, JR., WILLIAM E. FRANKLIN, CHARLES B. FROOME, LARRY D. GALYARDT, MARK D. GARCIA, PATRICK A. GERBER, JOHN GERMANN, WILLIAM R. GILMORE, JESUS M. GONZALEZ, REX L. GRAY, STEPHEN G. GRINER, CHARLES GUNTER, MARK S. HAHN, THOMAS A. HALL, WILLIAM O. HAMILTON, EUGENE H. HAMMOND, DALLAS E. HANKINS, JAMES L. HARMON, PASCAL A. HARVEY, LOREN D. HATHAWAY, MARC C. HAYNES, GARY J. HEATH, II, CARL G. HODGES, JR., LARRY HOLMES, DENNIS R. HORNBECK, DELBURT L.)

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DAVID P. JOHNSON, RUSTY)
JOHNSTON, RICHARD L. KANAGA,)
HARVEY D. KATES, WILLIAM A.)
KENNEY, BRIAN P. KERSCHEN,)
DONALD KERSTING, WARREN J.)
KING, RODNEY D. KINKELAAR,)
DANIEL L. KLAUSMEYER, DONALD)
T. KLOPPENBERG, JOHN)
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DONALD J. LANZRATH, FRANK J.)
LARY, LESLIE S. LASSLEY; BOYD A.)
LAUBER, KENT C. LAWSON,)
RANDALL J. LEIKER, STERLING M.)
LEWALLEN, DWIGHT H. LIEN, MARK)
R. LIVINGSTON, RONALD J.)
LONGAR, JERALD L. LOWDERMAN,)
KEVIN E. LYNCH, CHARLES M.)
MACY, SR., CHARLES M. MACY,)
MICHAEL D. MADDOX, WILLIAM H.)
MADEN, MICHAEL C. MALONE,)
MIKE MALTERS, MARTIN K.)
MARSHALL, JIM D. MARTIN, CURTIS)
R. MAST, LARRY K. MATTHEWS,)
DARREN L. MCCLINTOCK, DANIEL)
R. MCCLURE, MICHAEL W.)
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MYRTLE, TERRY W. NESMITH,)
SIDNEY J. NEWBY, TOD W. NEWLIN,)
WILLIAM W. NEWLIN, FREDRICK)
NICKELL, REX A. NICOLA, MEL)
OREBAUGH, MARTY J. ORTIZ, BILL)
K. OWENS, BRENT K. OWENS,)
CHARLES H. PEASTER, JR., MARK)
PEREZ, III, FRED L. PETERS, EDDIE)
A. PHILPOTT, DOUGLAS E. PICKARD,)
RICHARD E. POTTERTON, CHARLES)
L. POTTS, DAVID N. POWELL, PAUL)
E. POWERS, NORMAN J. PRICE, JR.,)
LARRY J. RAY, LON G. REDGATE,)
GREG R. REED, MARK A. REYNOLDS,)
GREGORY A. RIDDER, RICHARD R.)
RIDDER, JOHN C. RITCHARDS,)
BRUCE I. ROBERTS, MARK D.)
ROBERTS, JAMES R. ROBILLARD,)
JOHN R. ROBINSON, ROBERT W.)
ROBINSON, KENNETH P. RODGERS,)
CHARLES K. ROGERS, VERNON)
ROHLMAN, DONALD P. ROWE,)
JOHN M. RUSSELL, PHILIP L.)
RUSSELL, ROGER D. SALMANS,)
MICHAEL D. SAWYER, DARRELL)
SCHOFIELD, KENNETH R.)
SCHOFIELD, JAMES E. SCHROEDER,)
EARNEST E. SCHULER, GREG G.)
SCOTT, KENNETH SCHACKELFORD,)
KENNETH F. SIMMONS, JOHN L.)
SINGLETON, RANDY E. SLAUGHTER,)

NEIL A. SLECHTA, MICHAEL J.)
SMITH, PAUL M. SMITH, ELIZABETH)
C. SNOW, BRIEN N. SNYDER, GARY)
D. SPICKARD, O. L. STAUDACHER,)
MICHAEL R. STEELE, THOMAS J.)
STEINKIRCHNER, GREG STOKES,)
C. DWAYNE STOVALL, JOHN K.)
TABLER, LOUIS L. TANGNEY,)
ROBERT A. THOME, STEPHEN R.)
THOMSE, JAMES TIBBS, JR., JAMES A.)
TODD, JEFFREY B. TOEWS, JERRY W.)
TOLE, THEODORE J. TRASK, TERRY)
TRIMBLE, JOHN S. TURNER, GARY S.)
VAIL, MARY K. VANCE, RANDY)
VULGAMORE, STEPHEN A. WEBB,)
MICHAEL C. WELLS, BILLY J.)
WENZEL, FRANK M. WEST, DAVID L.)
WHITE, JAMES D. WHITEHEAD,)
JOHN A. WILLIAMS, RAYMOND)
WILLIAMS, STEVEN M. WILLIG,)
DAVID D. WILSON, LORENA R.)
WILSON, MAX L. WINSOR, FREDRIC)
J. WINTER, ROBERT L. WOLFE, JAMES)
L. WOODS, JR., JIM D. WOODS,)
TEDDY A. WOODS, JEFFREY C.)
CROCKER, TIMOTHY P. DENEEN,)
DAVID R. ARAGON, CHARLES E.)
BAGSHAW, RICK BAHR, RONALD D.)
BALDING, STANLEY K. BEVAN,)
MATT W. BOWEN, THOMAS K.)
CAUDELL, MARK K. CHAIRS,)
BRADLEY F. CRISP, LARRY J.)
CUSHENBERY, DAVE DARROW,)
RAYMOND A. DAVIS, MARK A.)
DEWEY, PAUL A. DEXTRAS, LANCE)
R. DIFFENBAUGH, ROBERT W.)

DUSENBERY, URBAN ECK, JAMES)
ELSON, ADRIAN L. EMERY, LANCE)
DWIGHT FLOWERS, MELVIN E.)
FRANKLIN, GARY A. FRAZIER,)
STEVEN D. FREEMAN, JAMES SCOTT)
FROMME, ROBERTO D. GARCIA,)
KENNETH J. GASTON, STEVEN D.)
GRAEBNER, ALAN J. GREEN, DAVID)
GUNTER, RICHARD P. HARRIS,)
RUSSELL F. HARRISON, ANTHONY J.)
HEARD, TODD HENRICKS, KENDALL)
J. HOPE, BRIAN D. HOY, JASON T.)
JONES, MARK A. JORDAN, G. R.)
KITCHE, TEDDY G. LEAKE, JACKY L.)
LUPER, JEFF T. MCCLERNON,)
ROBERT MCGREGOR, aka Scott)
McGregor; JERRY M. MCINTOSH,)
RONALD J. MIES, JOHN J. MILLER,)
III, LESLIE W. MILLER, MARK)
NONKEN, EUGENE L. PEARSON,)
DAVID C. PELAAM, MELVIN PRIEST,)
STAN E. RAITAR, RICHARD E.)
REEVES, MARK J. REIBENSPIES,)
JAMES A. RILEY, CARLOS A.)
RODRIQUEZ, KEVIN D. ROYSE,)
GREGORY L. SCHMIDT, STEVE K.)
SCHOWALTER, MATTHEW A.)
SCHULTE, DEBRA D. SHAUERS,)
LARRY SHELLMAN, JAMES F.)
STILLMAN, MIKE T. STOFFEL, TERRY)
L. TIMMONS, JOHN J. TULLY, KURTIS)
M. VOGEL JAMES D. WILSON,)
DOUGLAS W. WINTER, EARNEST G.)
LARKIN, CHESTER L. SELMON,)
MICHAEL W. GEORGE, KELLY M.)
ZANE, THOMAS A. DENT, DAVID T.)

THISSEN, RONALD G. VOGEL, MARTY J. SEIPEL, ANTHONY L. FRANKLIN, STEVEN S. TAYLOR, ADRIAN L. EMERY, JEFFREY C. ECKELS, BRIAN L. MOORE, TERRENCE D. SPEXARTH, BRADLEY J. BANZ, JONATHAN BARBER, TOM J. CARNEY, STEVEN J. CRUSINBERY, PATRICK K. EVERTON, BERNIE J. HUDSPETH, GREGORY L. LANDSVERK, JOHNNY MYERS, JAMIE NEWLIN, MARC L. POWELL, TIM VOSS, TIMOTHY K. WOODARD, JOSEPH M. WAPPELHORST, TIM HIGGINS, NEIL E. BARNES, WARREN B. KOEHN, TIM R. CLARK, STACEY E. WESPI, BOBBY W. MILLER, PATRICK GEORGE ROLAND, JEFFREY A. FREEMAN, FLOYD J. SOILEAU, JR., CHARLES D. EBERHARD, STEVE HERBST, TED M. BUSH, CHRISTOPHER ORLOSKE, GILBERT RODRIGUEZ, DAVID E. HERSH, GLENDA L. CRIPPEN, JOHN F. CRIPPEN, DONALD S. ECKERMAN, JAMES KRUEGER, CYRUS W. OMO, CHESTER THOMAS, and LINDA K. WHITE, fka Linda K. Shiney, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees and Cross-Appellants,

v.

CITY OF WICHITA,

Defendant-Appellant and Cross-Appellee.

ORDER
Entered June 9, 1995

Before EBEL, McKAY, and REAVLEY,* Circuit Judges.

This matter comes on for consideration of plaintiff-appellees'/cross appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
By /s/ L. Balzano
Deputy Clerk

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* The Honorable Thomas M. Reavley, United States Court of Appeals for the Fifth Circuit, sitting by designation.

APPENDIX H

STATUTES

29 U.S.C.A. § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. (2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes] by the Fair Labor Standards Amendments of 1966 –

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966 [Feb. 1, 1967],

(B) for a workweek longer than forty-two hours during the second year from such date, or

> (C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

29 U.S.C.A. § 207(e) "Regular rate" defined. As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include –

* * *

> (2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

* * *

29 U.S.C.A. § 207(k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in

law enforcement activities (including security personnel in correctional institutions) if –

> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> * * *

Other provisions:

Rules and regulations prescribed by Secretary. Rules and regulations with regard to 1966 amendment, see note to 29 USCS § 203.

Secretary of Labor to make studies. Act April 8, 1974, P. L. 93-259, § 6(c)(3), 88 Stat. 61, provides: "The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours

in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register."

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29 U.S.C.A. § 216(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public

agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * *

PRINCIPLES FOR COMPUTING OVERTIME PAY
BASED ON THE "REGULAR RATE"

29 C.F.R. § 778.108 The "regular rate".

The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated

as the regular rate for an employee; it must be drawn from what happens under the employment contract (Bay Ridge Operating Co. v. Aaron, 334 U.S. 446). The Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed – an "actual fact" (Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419). Section 7(e) of the Act requires inclusion in the "regular rate" of "all remuneration for employment paid to, or on behalf of, the employee" except payments specifically excluded by paragraphs (1) through (7) of that subsection. (These seven types of payments, which are set forth in § 778.200 and discussed in §§ 778.201 through 778.224, are hereafter referred to as "statutory exclusions.") As stated by the Supreme Court in the Youngerman-Reynolds case cited above: "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

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29 C.F.R. § 778.113 Salaried employees – general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35

hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.

(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $1,040, or a regular semimonthly salary of $520 for 40 hours a week, is thus found to be $6 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

[46 FR 7310, Jan. 23, 1981]

Subpart C – Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

29 C.F.R. § 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) *Section 7(e).* This subsection of the Act provides as follows:

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

* * *

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; [discussed in §§ 778.216 through 778.224].

* * *

(c) *Only the statutory exclusions are authorized.* It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into the total compensation

received by the employee before his regular hourly rate of pay is determined.

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29 C.F.R. § 778.218 Pay for certain idle hours.

(a) *General rules.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay under section 7(e)(2) of the Act and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Act.

(b) *Limitations on exclusion.* This provision of section 7(e)(2) deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either "holidays" or "vacations," or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest

given to employees in lieu of or as an addition to compensation for working on other days.

(c) *Failure to provide work.* The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule (as discussed in §§ 778.321 through 778.329), ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.

* * *

REDUCTION IN WORKWEEK SCHEDULE
WITH NO CHANGE IN PAY

29 C.F.R. § 778.321 Decrease in hours without decreasing pay – general.

Since the regular rate of pay is the average hourly rate at which an employee is actually employed, and since this rate is determined by dividing his total remuneration for employment (except statutory exclusions) for a given workweek by the total hours worked in that workweek for which such remuneration was paid, it necessarily follows that if the schedule of hours is reduced while the pay remains the same, the regular rate has been increased.

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29 C.F.R. § 778.322 Reducing the fixed workweek for which a salary is paid.

If an employee whose maximum hours standard is 40 hours was hired at a salary of $200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $5 per hour. If his workweek is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn $200, so that he earns his salary at the average rate of $5.71 per hour. His regular rate thus becomes $5.71 per hour; it is no longer $5 an hour. Overtime pay is due under the Act only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of $200 now covers 35 hours of work and no more, the employee would be owed $5.71 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times $5.71 ($8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive $5.71 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid. Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours –

$200, 5 hours' pay at $5.71 per hour for the 5 hours between 35 and 40 – $28.55, and 1 hour's pay at $8.57 for the 1 hour in excess of 40 – $8.57, or a total of $237.12 for the week.

[46 FR 7316, Jan. 23, 1981]

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29 C.F.R. § 778.323 Effect if salary is for variable workweek.

The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives $200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is $5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains $7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only

25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discussion of the effect of deductions on the regular rate, see §§ 778.304 to 778.307.)

[46 FR 7316, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

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29 C.F.R. § 778.324 Effect on hourly rate employees.

A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased as in § 778.322. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly rate basis to a fixed salary for a variable workweek up to 40 hours, the results described in § 778.323 follow.

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29 C.F.R. § 778.325 Effect on salary covering more than 40 hours' pay.

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of

$7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains $5 per hour and he is due, in addition to his salary, extra compensation of $2.50 for each hour over 40 but not over 55 and full time and one-half, or $7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is $5.50 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $5.50 per hour for the hours not worked.

[46 FR 7316, Jan. 23, 1981]

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29 C.F.R. § 778.326 Reduction of regular overtime workweek without reduction of take home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of $5 an hour and

regularly worked 50 hours, earning $275 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from $5 per hour to $6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be $285. The parties cannot, however, agree that the employee is to receive exactly $285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

[46 FR 7316, Jan. 23, 1981]

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29 C.F.R. § 553.201. Statutory provisions: section 7(k).

(a) Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in § 553.230 below, the 216-hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

(b) As specified in §§ 553.20 through 553.28 of Subpart A, workers employed under section 7(k) may, under certain conditions, be compensated for overtime hours worked with compensatory time off rather than immediate overtime premium pay.

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29 C.F.R. § 553.224 "Work period" defined.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period

of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

(b) An employer may have one work period applicable to all employees, or different work periods for different employees or groups of employees.

OVERTIME COMPENSATION RULES

29 C.F.R. § 553.230 Maximum hours standards for work periods of 7 to 28 days – section 7(k).

(a) for those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ration of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

29 C.F.R. § 553.233 "Regular rate" defined.

The rules for computing an employee's "regular rate", for purposes of the Act's overtime pay requirements, are set forth in Part 778 of this title. These rules are applicable to employees for whom the section 7(k) exemption is claimed when overtime compensation is provided in cash wages. However, wherever the word "workweek" is used in Part 778, the words "work period" should be substituted.

APPENDIX I

PERTINENT EXCERPTS FROM MEMORANDA OF AGREEMENTS

[10th Cir. Appellee Brief, App. Volume 1, pp. 72-104]

Beginning in 1977 and continuing through 1985, each provided in pertinent part:

> "Overtime will be computed at time and one-half for each hour worked over the regular work schedule (comparable to a 54-hour week) as set out below."[1]
>
> "To establish a work schedule comparable to 208 hours in 27 days averaged for the full year, each employee shall be granted four Kelly Days with pay each year. Said Kelly Days shall be scheduled at the convenience of the department so as to maintain proper firefighting capabilities. A Kelly Day shall consist of one full 24-hour shift. . . . "

On July 10, 1985, the respondent adopted a 19-day work period further reducing the petitioners' work schedules. The 1986 agreement provided in pertinent part:

> "Fire suppression personnel working a 56 hour week will be compensated at time and one-half of the hourly rate for all hours worked in excess of 144 in a 19 day work period."

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[1] In 1984 an addendum to the 1983 contract provided in lieu this paragraph: "Fire suppression personnel working a 56 hour work week (reduced to 54 by Kelly time off) will receive straight time for hours worked over the regular work schedule until the total reaches 248 hours in a 27-day-work-period."

"Each employee shall be granted six Kelly Days with pay; one shift shall receive seven Kelly days. Said Kelly Days shall be scheduled at the convenience of the department so as to maintain proper firefighting capabilities. A Kelly Day shall consist of one full 24 hour shift."

The 1987 agreement and those since have provided in pertinent part:

"Fire suppression personnel working a 56 hour week will be compensated at time and one-half of the hourly rate of the hourly rate for all hours worked in excess of 204 in a 27 day work period."

"Each employee shall be granted four Kelly Days with pay. Said Kelly Days shall be scheduled at the convenience of the department so as to maintain proper firefighting capabilities. A Kelly Day shall consist of one full 24 hour shift."

Supreme Court, U.S.
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No. 95-432

In The

Supreme Court of the United States

October Term, 1995

RONALD L. AARON, *et al.*,

Petitioners,

vs.

THE CITY OF WICHITA, KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is pay given a firefighter for four self-scheduled days off work each year ("Kelly days") within the class of "payments made for occasional periods when no work is performed due to vacation . . . or other similar cause, . . . and other similar payments to an employee which are not made as compensation for his hours of employment" that are excluded from an employee's "regular rate" of remuneration by Section 7(e)(2) of the Fair Labor Standards Act, 29 U.S.C. § 207(e)(2)?

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STATUTES:

29 U.S.C. § 207(e)(2) [Fair Labor Standards Act, § 7(e)(2)] ..... *passim*

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the City of Wichita, Kansas, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by petitioners.

STATEMENT OF THE CASE

This is a lawsuit brought against the City of Wichita, Kansas, by some of its firefighters. In their complaint, the firefighters alleged that the City had violated the Fair Labor Standards Act ("FLSA") because it had (1) failed to pay them for sleep and meal-time hours; (2) incorrectly characterized Fire Captains, Battalion Chiefs, and Division Chiefs as executive employees exempt from FLSA overtime provisions; and (3) incorrectly calculated the firefighters' FLSA "regular rate" of compensation by (a) incorrectly paying the firefighters based on hourly pay rates set out in collectively bargained pay agreements, despite the parties' alleged contrary intent; (b) failing to include pay for the firefighters self-scheduled quarterly days off work ("Kelly days") in the regular rate computation; and (c) including overtime hours in the regular rate computation.

On cross motions for summary judgment, the United States District Court for the District of Kansas ruled that (1) the City had paid the firefighters for all hours on duty, including sleep and meal-time hours, and was entitled to judgment on that claim; (2) the Captains and Chiefs were not salaried employees, but were paid hourly, were therefore not exempt executive employees, and were entitled to overtime pay; and (3) the City had miscalculated the

firefighters' FLSA regular rate of pay, and therefore owed them additional pay for both straight time and overtime hours. The District Court agreed with the City that pay for Kelly days was a form of vacation pay,[1] and properly excluded from the City's regular rate calculation, but held that the City had incorrectly excluded overtime hours from its calculation, and had incorrectly relied on the hourly rates set out in the collectively bargained pay agreements.[2]

The firefighters did not appeal the District Court's ruling that the City had paid them for all hours on duty.[3] The City, however, did appeal the District Court's rulings that the Captains and Chiefs were entitled to unpaid overtime pay, and that the City had incorrectly calculated the firefighters' regular rate and thus underpaid them. On appeal, the Court of Appeals for the Tenth Circuit

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[1] Because the District Court mistakenly believed that the City was crediting its Kelly days payments against its overtime liability, in its order of June 17, 1992, it initially accepted the firefighters' contentions that Kelly days should be excluded from the regular rate computation. *See* Petition for Writ of Certiorari, App. 30-32. The District Court corrected its error in its March 9, 1993, order, and adopted the City's view on the Kelly days issue. *See id.* at App. 46-47.

[2] The District Court also ruled that the City had not acted willfully, or in bad faith, and that petitioners were therefore not entitled to liquidated damages under 29 U.S.C. § 260 or to a three year limitations statute under 29 U.S.C. § 255(a). *See* Petition for Writ of Certiorari, at App. 59-66.

[3] The Firefighters did appeal the District Court's ruling that the City had not acted willfully, or in bad faith. The Court of Appeals did not reach those issues, instead ruling that the City had not violated the FLSA at all.

reversed both District Court rulings. The Court of Appeals held as a matter of law that the Captains and Chiefs were salaried employees, and remanded for further factfinding on the exemption issue. The Court of Appeals also held as a matter of law that the City had properly treated Kelly days and overtime pay in its calculations, and that the collectively bargained pay agreements reflected the parties' actual intent, and remanded for entry of judgment in the City's favor on the regular rate claim.

The ***only*** question presented in the Petition for Writ of Certiorari is whether payments for Kelly days are properly excluded from the regular rate determination because they are a form of vacation pay. The firefighters are normally scheduled to work every third day, with one work shift of 24 consecutive hours followed by 48 consecutive unpaid hours off work.[4] The City also affords them a variety of forms of paid time off from their regular schedule, including Kelly days and "variable" vacation days. The firefighters schedule their Kelly days, one day per quarter, through a seniority-based bidding system; they also schedule "variable" vacation days at the same time, using the same bidding system. Kelly days differ from variable vacation days in that (1) all firefighters earn four Kelly days annually (one day per quarter), whereas the amount of variable vacation a firefighter earns each year is a function of his seniority and attendance; and (2)

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[4] Unless another citation is given, all factual statements in this Brief in Opposition are taken from the opinion of the Court of Appeals, Petition for Writ of Certiorari, at App. 1-17, or the two initial opinons of the District Court, *id.* at App. 18-67.

a firefighter must schedule one Kelly day each quarter, and cannot carry Kelly days forward, whereas variable vacation days can be taken at any time within the year, and can be carried forward. Otherwise, Kelly days and variable vacation days are regarded as functionally equivalent by the firefighters. As petitioner Barnes testified:

> Q. Kelly days? Where it started and how and what it means?
>
> A. What it means for us is just another day off.
>
> Q. Is it like a vacation day?
>
> A. It is for me.
>
> Q. It is scheduled the same general way as a vacation day, is it not?
>
> A. With the exception that you can only have one in a quarter, yes.

10th Cir. Aplt. Supp. App. at 161-62. Petitioner Huntsperger testified to the same effect:

> Q. And you sign up for [Kelly days] at what time?
>
> A. Sign up for those when we draw vacations in October and November.
>
> Q. When you have a Kelly day what – is it essentially like a vacation day in that you are free to do whatever you want?
>
> A. Yes.
>
> Q. You have no restrictions on where you go or what you do or that type of thing?
>
> A. No.

Q. Is that correct?

A. Yes.

10th Cir. Aplt. Supp. App. at 164.

It should be noted that petitioners make several erroneous factual statements about Kelly days; petitioners either supply no record citation to support these assertions, or supply record citations that do not support their assertions. Thus petitioners erroneously state that "[r]espondent admitted the parties had contracted for Kelly days and that they were designed to reduce the number of hours of work of the petitioners and its overtime liability," Petition for Writ of Certiorari, p. 8, that "[t]he term 'Kelly days' . . . is commonly used in Fire Departments throughout the country to refer to forced absences from work to minimize overtime hours," *id.* at 7 n.2, that Kelly days are "regularly occurring absences intended by [the City] to reduce hours worked and overtime liability" and that Kelly days "reoccur at fixed intervals," *id.* at 11, 12-13. None of these statements has record support, and none is true. The City of Wichita's use of Kelly days, which do ***not*** occur at fixed or regular intervals, long predates the applicability of the FLSA to municipalities, and thus cannot have been "designed" to reduce FLSA overtime liability. *See, e.g.*, 10th Cir. Aplt. Supp. App. at 1, 5, 15-17, 19, 29, 48, 55, 72-73, 75, 83, 100, 105.

The District Court held that Kelly days should be excluded from the regular rate computation; it based its ruling on 29 U.S.C. § 207(e)(2), which provides that the regular rate shall not be deemed to include

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause.

Petition for Writ of Certiorari, at App. 46-47. The Court of Appeals reached the same conclusion; it explained that "after reviewing the record, we believe that 'Kelly days' were simply another form of paid vacation . . . . " *Id.* at App. 8. The sole question that petitioners ask this Court to review, therefore, is a question that both the District Court and the Court of Appeals have resolved against petitioners.

REASONS FOR DENYING THE WRIT

Petitioners suggest that this Court should grant certiorari in this case because, in their view, the District Court and the Court of Appeals both erred in holding that Kelly days are a form of paid vacation, or other "similar" paid leave, which is by statute excluded from the FLSA regular rate calculation. Petitioners further suggest that the Kelly days rulings of the courts below particularly merit review because, they say: (1) the rulings below conflict with the plain language of the FLSA; (2) those rulings conflict with the FLSA's underlying purpose; (3) those rulings conflict with the applicable administrative regulations; (4) the Kelly days issue is important because the rulings below, if allowed to stand, will negatively affect firefighters nationwide; and (5) the rulings below conflict with this Court's prior decisions. None of petitioners' proffered reasons for review has merit. The decisions at issue are not merely correct; they are fully

consonant with the FLSA's language and purpose, and with the apposite administrative regulations, they are entirely unremarkable, and they do not conflict in the least with this Court's prior FLSA decisions.

I. The Rulings Below Are Obviously Correct, and Entirely Unremarkable

Whether the District Court and Court of Appeals correctly held that pay for Kelly days could be excluded from the FLSA "regular rate" calculation depends on whether Kelly days are "vacation" (or similar thereto) as defined in Section 7(e)(2) of the FLSA, 29 U.S.C. § 207(e)(2), and its interpretive regulations. That statute provides in relevant part that an employee's remuneration, for "regular rate" purposes, does not include

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide work, or other similar cause . . . and other similar payments to an employee which are not made as compensation for his hours of employment.

Neither the FLSA, nor its legislative history, nor its case law, nor its interpretive regulations, define Section 7(e)(2)'s term "vacation."[5] The term therefore cannot have been intended to have some idiosyncratic meaning, and should be interpreted as bearing its ordinary meaning: "A period of time devoted to pleasure, rest, or relaxation,

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[5] Petitioners agree that there is nothing in the legislative history or case law that directly bears on the meaning of Section 7(e)(2)'s term "vacation." *See* Petition for Writ of Certiorari, at 14.

especially one with pay granted to an employee." American Heritage Dictionary, at 1969 (3d Ed. 1992). The interpretive regulations do indicate that, to qualify for the Section 7(e)(2) exclusion, payments must be "in amounts approximately equivalent to the employee's normal earnings for a similar period of time," 29 C.F.R. § 778.218(a). The City's practice meets that requirement, however: Firefighters are paid at the same hourly rate for "Kelly days" and "variable" vacation as they are paid when they are at work. The regulations also indicate that the absences paid for must be ones which are "infrequent or sporadic or unpredictable," rather than regular "absences," such as a lunch period or regularly scheduled day of rest, and explain by way of example that "Sundays may not be workdays in a particular plant, but this does not make them either 'holidays' or 'vacations.' " *Id.* § 778.218(b). The regulations also explain, with respect to the statutory term "other similar cause" that

> The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

29 C.F.R. § 778.218(d).

In light of these definitions and examples, the City's payment of its firefighters for Kelly days – four paid days off work each year, no more than one day per quarter,

scheduled by the firefighters themselves pursuant to the same a seniority-based bid system that sets their variable vacation days – on its face qualifies for the Section 7(e)(2) exclusion. Kelly days obviously fit the dictionary definition of "vacation." The firefighters are paid the same amount for a Kelly day as for a normal day at work. Any given firefighter has a Kelly day only infrequently (no more than once in any three-month period). And, because of the vagaries of the seniority-based bid system, under which the specific day on which a firefighter takes a Kelly day or variable vacation day is a function of his own preferences, his relative seniority, and the preferences of more-senior firefighters who bid ahead of him, the particular dates of any given firefighter's future scheduled Kelly days will be both sporadic ("occurring at irregular intervals," American Heritage Dictionary, *supra*, at 1742) and unpredictable ("difficult to foretell or foresee," *id.* at 1957).

Petitioners argue that Kelly days are not vacation-like because, petitioners say, they occur at "fixed intervals." Petition for Writ of Certiorari at 13. Petitioners' factual premise, however, is false. Because firefighters are free to bid for Kelly days at any time within a three month period, and because their choices are constrained by the previous bids of more-senior firefighters, scheduled holidays, and the City's minimum staffing needs, intervals between a given firefighter's Kelly days are almost certain to be irregular.

Petitioners also argue that Kelly days are not vacation-like because they reduce the number of hours a firefighter works, and may therefore also reduce the

number of overtime hours he works. *Id.* Under this specious argument, however, ***none*** of the forms of paid leave listed in Section 7(e)(2) would qualify for exclusion from the regular rate calculation. ***Any*** paid vacation, ***any*** paid holiday, ***any*** paid personal leave, ***any*** sick leave, ***any*** of the various kinds of paid time off work mentioned in Section 7(e)(2) and its interpretive regulations, will necessarily reduce hours worked and will therefore tend to reduce overtime work; plaintiff's argument, which would reduce Section 7(e)(2) to a nullity, must be rejected.

Petitioners further assert that Kelly days are not vacation-like because they are "prescheduled" in advance; yet petitioners point to nothing in the FLSA or interpretive regulations to suggest that vacations somehow stop being vacations if they are scheduled in advance. Respondent submits that ***most*** vacations are scheduled in advance, so that the employee can plan his vacation, and so that the employer can plan how to cover the employee's work while he is gone. Indeed, petitioners' Kelly days are prescheduled at the same time and by the same seniority-based bid process as petitioners' "variable" vacation days, yet petitioners no longer contend that "variable" vacation days are outside the statutory exclusion. Again, were petitioners' approach adopted, the Section 7(e)(2) vacation exclusion would be rendered meaningless.

In sum, a natural reading of the statute and regulations fully supports the rulings of the courts below that Kelly days are simply vacation days by another name, and therefore within the statutory exclusion. Petitioners' contentions that the Kelly day rulings of the District Court and the Court of Appeals contradict the plain

language of Section 7(e)(2) and its interpretive regulations, *see* Petition for Writ of Certiorari at 11, 15, are just not true.

II. The Rulings Below Are Fully Consistent With The Statutory Purpose

Although petitioners concede that neither the statutory language nor the legislative history of the FLSA support their contention that pay for Kelly days must be excluded from the FLSA regular rate computation (a concession that directly contradicts their own assertion that the decisions below go against the "plain language" of the statute), they nonetheless argue that only their proffered interpretation of the statute is consistent with the "principal Congressional purpose" underlying the FLSA. *See* Petition for Writ of Certiorari, at 14-15. Their argument on this point, however, is based on false factual premises.

Petitioners' "Congressional purpose" argument begins with the accurate premise that the main goals of the FLSA overtime pay provisions are (1) to provide financial incentive for employers to spread employment, by hiring additional workers, rather than requiring existing employees to work long hours; and (2) to compensate workers for the extra stress of working long hours. *See* Petition for Writ of Certiorari, at 14-15 (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942)). Petitioners' argument continues, however, with two false minor premises. Petitioners first say that the City's practice of paying the same hourly rate both for hours worked and for 96 annual Kelly hours "enables [the City] to avoid

paying for 96 hours annually," *id.* at 14. Since the City ***does*** pay them for their 96 annual hours of Kelly day leave, petitioners are in essence asserting that the City should be obligated to treat Kelly days both as paid vacation ***and*** as hours worked, and should therefore pay them twice for the same hours. Petitioners also say that the City's practice (presumably its use of Kelly days) "deprives" them of their statutory right to be compensated for overtime work at one and one-half times their normal hourly rate; yet the City has always in fact paid them one and one-half times as much for overtime work as it pays them for straight time work, as the Court of Appeals noted.[6]

As the City has explained above, *see* p. 10, *supra*, all forms of paid leave, including Kelly days, reduce the total hours that employees work, and therefore tend to reduce the amount of overtime work as well. Because it grants paid leave, the City has to hire more firefighters than would otherwise be the case. Now it may be that the firefighters would prefer less paid leave and more overtime work (although the multiple forms of paid leave collectively bargained for suggest otherwise). Congress's

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[6] As the Court of Appeals explained: "The contract [between the City and its firefighters], as well as the actual practice of the parties, clearly indicate that the base salaries in [the contract] were intended to cover a standard 56-hour work week or 112 hours per biweekly pay period. The regular rate so derived meets the minimum hourly wage requirements under the FLSA and all . . . overtime requirements were seemingly met by payment of time and one-half at that regular rate for all FLSA-determined overtime hours." Petition for Writ of Certiorari, at App. 10.

intent, however, as expressed in the FLSA, is to the contrary: Congress prefers to see firefighters work fewer hours, so that more firefighters may have jobs. *See, e.g., Overnight Motor, supra.* In truth, the City's policies of giving its firefighters paid leave from work further, rather than hinder, the FLSA goal of spreading employment by reducing overtime work.

III. The Rulings Below Do Not Conflict With Prior Rulings Of This Court

Petitioners suggest that certiorari should be granted in this case in part because, they say, the Kelly days rulings below conflict with prior decisions of this Court. Petition for Writ of Certiorari, at 18-21. Petitioners repudiate their own argument, however, when they concede that until this case no court had ever considered the particular Kelly days question presented here. *Id.* at 14 ("[T]he particular question at issue does not appear to have been specifically considered by . . . the courts."), at 18 ("Petitioners have found no cases which address the excludability of paid absences which can be likened to petitioners' 'Kelly days' "). Furthermore, examination of the supposedly conflicting decisions cited by petitioners reveals that none of them involves Kelly days, vacations, or any other analogous form of paid leave. *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 429 (1945), and *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948), both stand for the proposition that all employee remuneration must be included in the FLSA regular rate computation unless within one of the statutory exclusions, but neither involves the exclusion at issue here. Likewise, *Barrentine*

v. Arkansas-Best Freight System, 450 U.S. 728, 740-41 (1981), and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945) both hold that FLSA rights cannot be contracted away, but the present case simply does not present a waiver issue. In short, the "conflict" cited by petitioners is wholly imaginary.

IV. This Case Does Not Present An Important Question That Demands Immediate Resolution

Petitioners argue that the Kelly days issue presented here is a particularly important one whose resolution will affect thousands of firefighters nationwide, who petitioners say work under pay schemes similar to that used by the City of Wichita. But petitioners cite no evidence whatsoever, whether from the record in this case, or from other sources, to suggest that the facts of this case have a parallel in any other Fire Department. Moreover, the notion that the Kelly days issue presents a burning question that demands resolution is belied by the fact that, in the nearly 60 years since the enactment of the FLSA, neither the Kelly days issue nor any close analogue has ever before been addressed. No prior case, out of untold hundreds of FLSA cases, has even mentioned the question presented here, much less disagreed with the decisions made by the Court of Appeals and the District Court in the present case. Likewise no FLSA regulation, out of the thousands of pages of FLSA regulations that appear in the Code of Federal Regulations, has ever directly dealt with such an issue. Respondents suggest that if this case presented a burning issue of FLSA construction, as petitioners would have it, FLSA litigants,

courts, and the Labor Department would not have gone 60 years without noticing.

The courts below, in a case of first impression, held that the pay the City of Wichita's firefighters receive for Kelly days – four annual days of self-scheduled paid leave that cannot be taken more frequently than one day per quarter – is tantamount to vacation pay, and therefore within the regular rate exclusion provided by 29 U.S.C. § 207(e)(2). The decisions below are correct, reasonable, and conflict with no decisions before or since; moreover, the factual grounding for the decision may be unique (petitioners have not shown to the contrary). It is therefore clear that this case presents a particularly poor candidate for this Court's discretionary certiorari review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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